

Campaign for Judicial Accountability and Reforms

The 2nd National Convention

on

"The Judiciary & the Poor"

23rd & 24th February, 2008

Indian Society for International Law

Bhagwandas Road

New Delhi

INDEX

Campaign Statement	Pg 1
Programme for the Second National Convention on the Judiciary and the Poor.	Pg 3
Background paper for the Second National Convention on the Judiciary and the Poor	Pg 5
Status Report of the Campaign	Pg 8
Wither Judicial Accountability? The Case of Justice Sabharwal: Disquieting Facts Disturbing Implications: <i>Press Release Issued by the Campaign</i>	Pg 11
Justice Sabharwal's defence becomes murkier: Stifling public exposure by using contempt powers <i>Press Release Issued by the Campaign</i>	Pg 15
Scandal in the Palace <i>Arundhati Roy, Outlook</i>	Pg 19
Sabharwal on Trial <i>Justice V.R. Krishna Iyer, Times of India</i>	Pg 25
Shocking abuse of judicial power <i>Editorial, The Hindu</i>	Pg 27
Law and B ehold <i>A. G Noorani, Hindustan Times</i>	Pg 29
Securing Judicial Accountability , Freedom of Speech vs. Power of Contempt; Towards an Independent National Judicial Commission. <i>Prashant Bhushan</i>	Pg 31
Report on the Seminar on "Securing Judicial Accountability"	Pg 35

Contempt power and some questions

Justice V.R. Krishna Iyer, The Hindu

Pg 46

Criticism is not contempt

Karan Thapar, Hindustan Times

Pg 49

It's the right of everyman to make fair comment

Fali S. Nariman, The Asian Age

Pg 51

Clean up the Judiciary

Shanti Bhushan, Times of India

Pg 53

Matters of Policy

A.G. Noorani, Hindustan Times

Pg 55

Has the philosophy of the Supreme Court, on Public Interest Litigation, changed in the era of Liberalisation?

Prashant Bhushan

Pg 57

Press Release on the Motion for the removal of Justice Jagdish Bhalla

Press Release Issued by the Campaign

Pg 65

Motion for the Removal of Justice Jagdish Bhalla

Campaign for Judicial Accountability and Reforms

Pg 68

Explanatory notes for the Motion for removal of Justice Jagdish Bhalla

Campaign for Judicial Accountability and Reforms

Pg 69

Campaign Support:

see back cover

Printer:

Printcraft (9891094240)

Published:

Campaign for Judicial Accountability
and Reforms, 2008, New Delhi

Address:

14, Supreme Enclave, Tower No. 2,
Mayur Vihar, Phase – 1,
New Delhi 110 091
Email: judicialreforms@gmail.com
Website: www.judicialreforms.org

CAMPAIGN STATEMENT

CAMPAIGN STATEMENT ISSUED BY THE FIRST PEOPLE'S CONVENTION ON JUDICIAL ACCOUNTABILITY AND REFORMS

(Adopted at Indian Social Institute, New Delhi on 10th & 11th March 2007)

The judicial system of the country, far from being an instrument for protecting the rights of the weak and oppressed, has become an instrument of harassment of the common people of the country. In fact it has become the leading edge of the ruling establishment for pushing through neo liberal policies by which the resources such as land, water and public spaces left with the poor are being increasingly appropriated by the rich and the powerful. While the system remains dysfunctional for the weak and the poor when it comes to protecting their rights, it functions with great speed and alacrity when invoked by the rich and powerful, especially when it is for appropriating the land and public spaces from the poor. The courts are increasingly displaying their elitist bias and it appears that they have seceded from the principles of the Constitution, which set up a republic of the people who were guaranteed "Justice - social, economic and political".

The problems with the judicial system begin with the lack of access to the system for the weak and the poor, partly because of the procedurally complex nature of the system, which can only be accessed through lawyers who are unaffordable to the common people. On top of this is the delays and lethargy of the system, which makes justice a distant dream even for people who can afford access to the system.

Compounding this further is the problem of corruption in the system exacerbated by a total lack of accountability of the higher judiciary. The layers of protection from accountability afforded to judges include the lack of any effective disciplinary mechanism, the self acquired protection from even being investigated for criminal offences, the virtual immunity from public criticism due to the law of contempt, and finally by the immunity from public scrutiny by another judicially created insulation from the Right to Information Act.

The most serious problem has however been created by the elitist and anti poor bias of the judiciary. It has essentially become an instrument for protecting and furthering the interests of the rich and powerful, both Indian and foreign. Thus judges who have taken the Oath to defend the Constitutional principles of Justice-Social, economic and political have ordered the bulldozing of the homes of lakhs of jhuggi dwellers, leaving them homeless on the streets. They have ordered the removal of lakhs of street vendors and rickshaw pullers from the streets of Delhi and Bombay, thus effectively depriving them of their livelihood. By their "creative reinterpretation" of labour laws they have effectively deprived citizens of the protection afforded by the laws. They have thus accomplished the corporate friendly "labour reforms" which successive governments have not had the political mandate to do.

It is clear that the judicial system needs to be reclaimed and reinvented by the people of the country, so that it can come to function in accordance with the philosophy of the Constitution. The system will need to be cleared of procedural complexities and cobwebs so that it can be accessed by the common citizens without professional lawyers, who have become a part of the exploitative judicial system. It will need to be strengthened to deliver justice quickly, efficiently and honestly. Whatever, additional financial allocation or additional judges are required for this must be done. For this, the various layers of protection created to shield the judges from accountability would have to be peeled away. To begin with, the clause relating to scandalizing the judiciary would have to be deleted from the Contempt of Courts Act.

The system of appointments of judges would have to be made transparent and such that the proposed appointees can also be scrutinized from the point of view of their sensitivity to the ideals of the Constitution. An independent Judicial Commission would be needed to examine complaints against judges and hold them accountable. The immunity from criminal investigation would need to be withdrawn. The Right to Information Act would need to be strictly enforced particularly for the judiciary. In fact, every judicial proceeding must be video-taped and its record made accessible to the people

None of these changes would however be made by the ruling establishment of the country without sustained public pressure from below. Both the executive and the judiciary are obviously happy with the existing state of affairs. The judiciary enjoys enormous power without accountability and the government is happy with a judiciary, which enthusiastically promotes its neo liberal policies. The only judicial reforms that the government appears to be interested in is market oriented reforms such as increasing arbitration which is a form of privatized system of justice for the wealthy.

The judiciary has long been regarded as a holy cow that was considered out of bounds for people outside the select circle of lawyers, judges and government Commissions. It is increasingly clear that it would be suicidal for the common people to ignore it any longer. That is why several organisations, which work with common people came together to organize this convention. We hope and expect that this convention will kick start a people's campaign and movement on this important issue. The contours and strategies of this campaign will be worked out, but one element would definitely be a concerted effort to keep a close watch on the actions and judgments of judges particularly from the point of view of class and communal bias, arrogance, corruption and non-adherence to Constitutional principles. The threat of contempt must be ignored and mass contempt will have to be committed if any attempt is made by the judiciary to use the contempt law to discourage this scrutiny.

This convention resolves to encourage people's organizations all over the county to initiate a sustained public campaign to reclaim the judiciary for "We the people" of this republic.

**2ND NATIONAL CONVENTION ON
THE JUDICIARY AND THE POOR**
Campaign for Judicial Accountability and Reforms
23-24 February 2008
Indian Society for International Law,
9 Bhagwandas Road, New Delhi.

SCHEDULE

Day One – Saturday 23rd February 2008

<i>9.30 am</i>	<i>Registration of the delegates and Tea</i>
10.00 am – 11.15 am	Inaugural Session Status report on the Campaign by Prashant Bhushan Recorded Address by Justice V.R. Krishna Iyer Key note address by Arundhati Roy
Session – I (11.15 am – 1.10 pm)	
11.15 am – 12.00 pm	Discussion on the need for an informal court system and the access to justice of the poor. – Aruna Roy, Nikhil Dey
12.00 pm – 1.10 pm	Open Discussion
<i>1.10 pm – 2.00 pm - Lunch Break</i>	
Session – II (2.00 pm – 3.30 pm)	
2.00 pm – 2.45 pm	Discussion on the Judiciary and urban poor – Dunu Roy, Simpreet Singh
2.45 pm – 3.30 pm	Open Discussion
Session – III (3.30 pm – 5.00 pm)	
3.30 pm – 4.15 pm	Discussion on the Judiciary and rural poor – Shankar Gopalakrishnan, Medha Patkar
4.15 pm – 5.00 pm	Open Discussion

Day Two – Sunday 24th February, 2008

<i>9.30 am – 10.00 am – Tea</i>	
Session - IV (10.00 am – 11.00 pm)	
10.00 am – 10.30 am	Discussion on the Judiciary and Labour – Dr. Baba Adhav, Prof. Babu Matthew
10.30 am – 11.00 am	Open Discussion
Session – V (11.00 am – 12.00 am)	
11.00 am – 11.30 am	Discussion on the Judiciary and Corporates – Arun Agarwal, Shiva Kant Jha
11.30 am – 12.00 pm	Open Discussion
Session – VI (11.30 pm – 1.10 pm)	
12.00 am – 12.45 pm	Discussion on the Judiciary and civil liberties and civil rights – Nitya Ramakrishnan, Colin Gonsalves
12.45 pm – 1.15 pm	Open Discussion
<i>1.15 pm – 2.00 pm – Lunch Break</i>	
Session –VII (2.00 pm – 5.00 pm) Open Discussion on strategies for the campaign -Formation of a Campaign Organization-	
2.00 pm – 2.20 pm	Blueprint for a people friendly Judiciary. Prashant Bhushan
2.20 pm – 3.00 pm	Open Discussion
3.00 pm – 3.30 pm	Campaign strategy. Bhaskar Rao, Arvind Kejriwal
3.30 pm – 5.00 pm	Open Discussion
<i>5.00 pm –5.15 pm - Tea</i>	

Note: The discussion on both days will be interspersed with experiences of the people's organisations attending the convention.

Monday, February 25, 2008

Press conference and release of the press statement on the convention.

Venue: Press Club of India, Raisina Road, New Delhi-110001

Time: 4 pm to 6 pm

Speakers: Medha Patkar, Aruna Roy, Nitya Ramakrishnan, Arvind Kejriwal and Shanti Bhushan

THE JUDICIARY AND THE POOR

Background paper for the Second National Convention
23rd and 24th February 2008

If one were to ask the question: What percentage of people has a realistic access to the judicial system in this country? The answer would invariably be, “Less than half”. The reason for this is, that the judicial system in this country was designed and set up for the British in colonial times. It was not created as an instrument to provide justice to the common people of this country, but to aid the empire in its quest to keep the native population in subjugation. This is why the system was made so procedurally complex and to work in the English language, that it is impossible for common people to access it without the help of lawyers. The code of dress itself was made so formal so as to create awe of the system in the minds of the common people. If one considers the fate of a common person who is accused of a crime, one can see that it is impossible for him to defend himself, and he is totally at the mercy of the police and the judiciary. This is because he would not even understand the language, let alone the procedure of the court. And he cannot afford lawyers. The hard reality is that the judicial system of this country exists only on paper for the vast majority of the country’s people. It is not functioning as an instrument to provide justice to them.

When Public Interest Litigation (PIL) was envisaged and created in the late seventies by Justices Bhagwati Krishna Iyer, *et.al*, it was thought that a new instrument had been fashioned whereby the superior courts could be activated by citizens concerned about the rights and livelihood of the poor, and the courts would then proactively act on behalf of the general public to protect the rights of the poor. Simultaneously, the Supreme Court at that time gave an expansive interpretation of fundamental rights, particularly the right to life guaranteed under Article 21 of the Constitution. Art. 21 was interpreted to include the right to live with dignity and, therefore, to have all the basic requirements for leading a dignified life, such as food, shelter, education, health, etc.

In the eighties, therefore, there were a series of path-breaking judgments to this effect, whereby courts made positive directions for the liberation of bonded labour, for paying minimum wages to workers, for protecting the rights of under trials and detenues, for the conditions of inmates of mental homes, for the rights of pavement dwellers, etc. However, as Public Interest Litigation evolved through the nineties, in the era of liberalization, the attitude of the higher courts towards the poor could be seen to undergo a slow but clearly perceptible change. Today, one finds that the Courts are refusing to direct the Government and the authorities to ensure the means of livelihood, shelter and even civil liberties of detenues, under trials, etc. Thus, it is refusing to implement its own earlier judgments when cases have been brought before it regarding the non-provision of shelter, food, water, health and education for the poor.

Today, with the poor facing the brunt of the onslaught of neoliberal economic policies in which the land, water and means of livelihood of the poor is being appropriated by the State for large corporations for mining, SEZs and other infrastructure projects for the wealthy, the courts should have come to the aid of the poor oustees whose rights are being violated. But, we find that even when some public-spirited organizations or individuals have taken these issues to court, their response has been dismal.

Lately, an even more disturbing trend has become visible, whereby the courts acting purportedly in public interest cases filed by the middle class and upper middle class, have passed orders which have effectively taken away the shelter, occupations, livelihoods and even the liberty of the poor. In many cases, this has been seen to be done by the courts without even issuing notice to poor persons whose homes were being demolished on their orders, who were being deprived of their livelihood and whose

occupation was being destroyed on the express orders of the courts. This is sometimes being done to purportedly uphold the “rule of law” and thus prevent the poor people from occupying tenements built on government land and sometimes to protect the rights of the wealthy to have a clean and congenial environment (such as removal of jhuggis from the vicinity of the upper middle class residential colonies and removal of hawkers from the streets of Delhi and Bombay). On other occasions, it was being done to provide space on the Delhi roads for middle class and upper middle class commuters who travel in cars (removal of cycle rickshaw pullers from the streets of Delhi).

It appears that some of these orders of the court are being issued at the behest of the Government which wanted to clear the slums of Delhi on the Yamuna Pushta to make way for five star hotels and shopping malls, etc. However, the Government did not have the political courage to remove these slums themselves, being conscious of the fact that it has to face the electorate every five years. It, therefore, found a convenient instrument in the judiciary, which has no democratic, or other accountability, and which could easily pass such orders, especially when it suited its class interests. Another example of this apparent collusion between the government and the judiciary is the manner in which the Supreme Court has, over the last few years, systematically dismantled legislation for the protection of the workers and labourers, which was so painstakingly enacted in the fifties, sixties and seventies. As economic policies were being liberalised and foreign companies being invited to set up shop in India, there was a determined attempt by the industry to get labour protection laws diluted. They said that the country needs a new generation of reforms called “labour reforms” which would effectively do away with all the protection given to labour and leave them at the mercy of their employers and open to hire and fire. Successive governments, however, found it difficult to legislatively repeal labour laws because of their dependence on Left parties or their fear of electoral backlash from workers and the poor. Again a convenient instrument was found in the judiciary, which has begun the process of systematically dismantling labour protection legislation, by “creatively” reinterpreting it in a manner so as to effectively allow hire and fire. The Contract Labour Act has almost become a dead letter as the courts are refusing to enforce it in case after case. The Supreme Court has even gone so far as to explicitly state that the courts are to interpret the labour legislation in line with the government’s economic policy. In a similar vein, another Bench of the Supreme Court while upholding a government decree to allow post box companies registered in Mauritius to enjoy the benefit of the Indo-Mauritius Double Taxation Avoidance Agreement and thus avoid paying any tax in India (A route now conveniently employed by all foreign companies operating in India) went on to say that the government can effectively give tax holidays to companies by executive orders, thus making nonsense of the well settled principle that tax holidays or concessions could only be legislated upon by the Parliament through the Finance Act.

Even in matters of civil liberties, one is now witnessing the totally illiberal and almost fascist attitude of the courts when it comes to the rights and liberties of persons accused by the State of being Naxalites, Maoists or even persons who are accused of being human rights activists working for the human rights of Left Wing activists or Naxalites. The manner in which the Supreme Court has dealt with the appeals of persons accused by the State of being Maoists or Naxalites, and the manner in which they have denied bail to Dr. Binayak Sen, one of the finest human rights activists to have emerged in this country in recent times, is indicative of an almost fascist mindset of several of its judges.

Thus it is becoming clear now that the judiciary in this country has become an instrument, which is being used to harass, intimidate and deprive the poor of their rights. It has become part of the draconian institutions of the State such as the police and the bureaucracy, which are today serving as agents of large corporations and the affluent.

The reasons for this anti-people attitude of the judiciary in the country, lies in its structure, its class representation and the manner of its selection and perpetuation of its

members. The overwhelming majority of judges of the higher judiciary belong to the upper castes and the upper middle class. They have, by and large, very little empathy for the poor. The process of selection of judges is opaque and non-transparent, arbitrary and nepotistic and virtually rules out the selection of any persons not in tune with the prevailing ideology and lack of sensitivity of the ruling classes in this country. In 1993, by a creative interpretation of the Constitution, the Judiciary took over the process of appointment of judges from the Executive. This was ostensibly done to ensure the independence to the Judiciary from the Executive. However, in its actual working practice, this has neither increased the independence of the judiciary from the Executive nor improved the quality of appointments in terms of either integrity of the appointees, competence or sensitivity towards the poor.

The time has therefore come for the people of this country to take stock of the present state of the judicial system and in particular the manner in which the judiciary has become an instrument of harassing the poor rather than an instrument for protecting their rights and giving them justice.

It is in this spirit and to discuss all these aspects and what needs to be done, that this Convention on "the Judiciary and the poor" is being organized. In this Convention, we will examine in some detail the structure, the functioning, the actions and the attitude of the judiciary of this country, particularly towards the poor and try to find some answers to the structural changes that are required to fundamentally change the working of the judiciary so that it becomes an instrument for enforcing the rights of the poor and the common people of this country. We also need to deliberate upon a campaign and a political strategy to force the authorities to bring about such changes.

It is hoped that representatives of a large number of people's movements, grass root organizations and other individuals who are concerned about the state of the judiciary in this country would participate in this Convention.

STATUS REPORT

Campaign for Judicial Accountability and Reforms

2007-2008

Brief Background

The Campaign for Judicial Accountability and Reform was launched in March 2007 with a two-day National People's Convention on Judicial Accountability and Reforms, organised in New Delhi. Although the Campaign had already been working, albeit with a different name (The Committee on Judicial Accountability), on issues of accountability and transparency in the Indian Judicial System for almost a decade prior to this convention, it felt the need to reach out to people outside the legal fraternity to strengthen the Campaign and make it even more effective. The Campaign came to the conclusion that accountability and transparency in the Indian Judiciary could only be made possible if the common people, especially the poor, who were adversely affected by the judiciary and the judicial system, came together and raised their voice against the elitist, anti-poor, opaque and corrupt judicial system.

The Campaign has, since its inception, highlighted several serious problems with the Indian Judicial System including its lack of affordability, its inaccessibility by the poor and marginalised, the appointment of its judges, its elitist and anti-poor bias, the lack of proper redressal mechanisms to address grievances against judges, inordinate delays in deciding matters and its inherent and pervasive lethargy.

In March 2007, through the National Convention, the Campaign resolved to encourage people's organisations and movements all over the country to initiate a sustained public campaign to reclaim the judiciary for "We the people" of this republic. Thereafter several people's organisations, non-governmental organisations, citizen's groups and individuals have endorsed the Campaign for Judicial Accountability and Reforms. Several organisations came together to launch a sustained Campaign, the list of all organizations are listed in our website and broadly include Human Rights organizations, Housing Rights Organisation, Unorganised Labour Organisations, Organisations working for the right to information and transparency, Women's Rights Organisations, Peoples Movements, Forest Dwellers Rights, and a several people's organisations, non-governmental organisations, citizen's groups and individuals.

The Campaign has a small working group that meets every fortnight to discuss the Campaign's activities, action and the way forward. The Campaign website (www.judicialreforms.org) is regularly updated with news and events on the judiciary, the judge watch and judgment watch sections- along with reports on the Campaigns activities and updates about the Campaigns forthcoming events.

Activities undertaken in the year March 2007- January 2008

10th-11th March 2007: First Peoples Convention on Judicial Accountability and Reforms organised in New Delhi to launch the Campaign. The Convention brought together over 250 participants from over 50 organisations to discuss the impact of the judiciary and on the lives of common people, especially the poor and the systemic problems with the present judicial system. The Convention made an appeal to all organisations to set up regional secretariats of the Campaign, take ownership of the Campaign and jointly work towards addressing the problems with the Indian judiciary and judicial system.

Hyderabad: 20th June 2007: A regional seminar on Judicial Accountability and Reforms was organised by ASCI-CMS in Hyderabad. A charter listing various concrete demands to reform the judiciary, making it more accessible and accountable was adopted.

Jaipur: 8th September 2007: A seminar was organised by Academy for Socio-Legal Studies and discussed issues related to the non-transparent and unfriendly nature of the judiciary towards the common people. The present feudal system it was proposed should be replaced by a 'people oriented judiciary, which is easily accessible, transparent, and based on good faith and social consciousness. It was also observed that the present judicial system is not only time consuming and expensive but in fact it has become redundant as far as true justice to the people is concerned. Therefore, the need to build a people's campaign and sustain it is essential.

Mumbai: 22-23rd December 2007: Over a 100 people participated in a Convention organised in Mumbai on the issue of judicial accountability and reform. Former CJI Mr. R.C. Lahoti inaugurated the Convention. Several civil society activists, and lawyers participated the Convention. Janhit Manch was hopeful that the Convention would advance the quest for securing judicial reforms so that the judicial system is accessible to more people.

Campaign exposing misconduct by Former Chief Justice of India

3rd August 2007: The Campaign for Judicial Accountability and Reform took up the issue of conflict of interest by the former Chief Justice of India, Y K Sabharwal in the Delhi sealings matter after the Mid-Day carried stories on the same. A Press Conference was organised sharing the facts of the case with the press. "Whither Judicial Accountability? The case of Justice Sabharwal: Disquieting facts, disturbing implications".

17th September 2007: A subsequent Press Conference on the Sabharwal matter was organised to disclose further documents and telephonic conversations with Justice Sabharwal and others in the Delhi sealings case.

25th September 2007: The Campaign organised a Press Conference to release the Statement by several well-known members of Civil Society inviting contempt action against themselves, in support of the Mid-Day journalists.

27th September 2007: The Campaign participated and supported the Journalists demonstration in response to the Mid Day judgement where the Delhi High Court issued a suo motu Contempt Notice to three Mid-Day journalists on the Sabharwal matter and sentenced them to prison.

26th November 2007: A formal Complaint was filed by the Campaign for Judicial Accountability and Reform against Justice Sabharwal, in the Central Vigilance Commission (CVC) and Central Bureau of Investigation (CBI) seeking a CBI enquiry into his misdemeanors.

Campaign Impact

The media at first hesitant took active interest in reporting the Sabharwal case, the contempt case against the Mid-day journalists was the rallying point, which enabled the media to shed their inhibition about writing on the judiciary. With *Tehelka* taking the lead in doing a cover story on the Sabharwal case, several national print and electronic media houses initiated a deserving debate on the problems ailing the Indian judiciary and judicial system. In particular the issue of appointments, lack of independent

mechanisms to probe charges of corruption against erring judges (sitting and retired) and the issue of contempt were discussed through media reports on the Sabharwal case, editorials and opinion pieces on the state of the Indian Judiciary.

Members of Parliament also expressed dismay over the misconduct in the highest office of the Judiciary. The Speaker of the Lok Sabha, Shri Somnath Chatterjee gave a statement saying that charges against the former chief justice, Y K Sabharwal should be examined – “we can’t be guided by any form of dictatorship of the legislature, executive or the judiciary” (*in the Hindustan Times dt. 28th September 2007*)

Member of Parliament Shri Sharad Yadav demanded a response from the government on the Sabharwal matter. Digvijay Singh (JD -U), D. Raja (CPI), V. Narayanswamy and Vijay Darda (Congress) supported Yadav’s demand for a debate in the House on the Sabharwal issue and for a permanent mechanism to fix accountability of the judges. The motion to discuss the Sabharwal case has been accepted for discussion in the Rajya Sabha.

In addition to this senior jurists like Justice V. R. Krishna Iyer, Justice J. S. Verma, Justice P. B. Sawant, Justice Bhagwati said any attempt to brush the Sabharwal issue under the carpet “could seriously tarnish the judiciary’s image.” They demanded a probe into the allegations of the Ex-CJI by the Supreme Court and the Government.

13th October 2007: A seminar on “Securing Judicial Accountability” was organised inviting representatives of all major political parties and senior members of the Bar - Shri. V.P.Singh, Former Prime Minister, Justice J. S. Verma, Former Chief Justice of India, Mr. Arun Shourie, Former Cabinet Minister and Former Editor of Indian Express, Mr. A.B. Bardhan, General Secretary of CPI, Mr. Ram Jethmalani, Former Law Minister, Shri. Sharad Yadav, President Janta Dal (U), Mr. Sita Ram Yechuri, Member Polit Bureau, CPI (M), Mr. P.C. Alexander, Member Rajya Sabha and Former Governor of Maharashtra, Mr. Dinesh Trivedi, Leader Trinamool Congress, Rajya Sabha, Mr. Vinod Mehta, Editor Outlook, Ms. Arundhati Roy, Writer and Social Activist, Mr. Kamal Mitra Chenoy, Member Central Committee, CPI shared their views on the subject – “freedom of Speech vs. Power of Contempt; towards an Independent National Judicial Commission”.

The Seminar concluded with the understanding that there is a crying need of exercising disciplinary power over judges; that truth as defence and anything said in good faith would not constitute contempt. There was also consensus on establishing an independent National Judicial Commission, with the proposed structure of two committees under the NJC - one committee to look after appointment and another that would consider cases of removal or disciplinary proceedings.

Campaign for Impeachment motion

16th November 2007: A Press Conference was organised with three eminent members of the legal fraternity, former Law Minister of India, Shri Shanti Bhushan, Shri Fali S. Nariman and Prashant Bhushan called upon Members of Parliament, cutting across party lines, to sign an impeachment motion against Justice Bhalla on the basis of three serious charges raised against him which showed gross impropriety on the part of the Judge. A press statement was also issued which Shri Ram Jethmalani, Shri Shanti Bhushan, and Shri Fali S. Nariman jointly signed.

21st January 2008: Press Release issued on the Proposed Elevation Of Justice Bhalla. The Campaign expressed its surprise and dismay at the reported assent given by the Prime Minister and the President to the proposed elevation of Justice Jagdish Bhalla as Chief Justice of Himachal Pradesh High Court. In the release the Campaign also urged the authorities to withdraw the proposal to elevate Justice Bhalla as a regular Chief Justice, even at this late stage.

WITHER JUDICIAL ACCOUNTABILITY? THE CASE OF JUSTICE SABHARWAL: DISQUIETING FACTS, DISTURBING IMPLICATIONS

Press Release : *New Delhi 3rd August 2007*

The issue of accountability of the higher judiciary has long been troubling all sections of society. While the power of the higher judiciary has greatly increased over the years because of the poor popular perception of the political class, which the judiciary has used to enhance the scope of its actions, its accountability has been gradually reduced. The V. Ramaswami case showed the impracticality of impeachment as a remedy for judicial misconduct. Since then there has been a lot of talk of an independent National Judicial Commission for enforcing judicial accountability, but none has been constituted, in the teeth of the steadfast opposition of the Judiciary to any independent disciplinary body over them. Meanwhile the Supreme Court by judicial fiat has restrained even the registration of any FIR against a sitting judge, without the prior permission of the Chief Justice of India. All this, while a draconian Contempt law has been used to silence any public and media scrutiny of judicial misconduct. And now, there is an attempt to effectively insulate the judiciary from the Right to Information Act. However, the silver lining is that the Parliament has recently amended the Contempt of Courts Act to allow truth as a defence to a Contempt Action. It therefore becomes very important for all, particularly the media, to diligently investigate and truthfully expose cases of judicial misconduct.

The recent outburst of the Apex Court against the TV journalist Vijay Shekhar on his sting operation to show the reckless and corrupt manner in which arrest warrants can be obtained from the Gujarat Courts only strengthen the public perception that the Judiciary will try to use its powers of contempt to hide the rot within the judiciary. This must be stoutly resisted by the media and Civil Society. If we allow ourselves to be intimidated by such tactics, we will be guilty of allowing an unaccountable judicial dictatorship to flourish within our republic. No court will use its power of contempt in such cases if the media and civil society stand up together against it.

The Campaign for Judicial Accountability and Reforms was set up by a National People's Convention held at Delhi in March this year. The object is to organize civil society, who is the real consumers of justice to take up a Campaign for Judicial Accountability and Reforms. It was set up after a painful realization that neither successive governments nor the judiciary have been serious about repairing the decrepit judicial system, nor about introducing any real accountability for the higher judiciary. We realized that nothing substantial could be done unless there is a strong and vocal campaign by the common people of this country who are the real stakeholders in the system of justice. Our campaign is a small beginning to highlight issues involving systemic problems with the judiciary as well as individual cases of judicial misconduct. We have set up a website of the Campaign which has sections on judicial reforms, Judge Watch, Judgement Watch etc. Several case studies of past instances of judicial misconduct are put up on the website. We now present a very recent and serious case study of such misconduct, which took place at the very highest levels of the judiciary.

On 16th February 2006, the then Chief Justice of India, Y.K. Sabharwal passed a detailed order setting into motion the process of sealing of properties in designated residential areas of Delhi which were being used for commercial purposes. In the drive that followed to implement the order, thousands of premises being used for commercial purposes such as shops and offices, many of which had been functioning for decades, were sealed,

forcing them to buy or rent premises in shopping malls and commercial complexes. This sealing went on relentlessly under the continuous supervision of Chief Justice Sabharwal's bench, monitored and directed by a Court appointed monitoring committee.

The Court's orders were ostensibly made to implement the rule of law as embodied by the Delhi Master Plan 2001, which had designated the land use of those areas as residential. There were however two ways of implementing the rule of law in such circumstances. Either order sealing of residential premises put to commercial use, or order authorities to alter the master plan and change the land use of areas, which were essentially being used for commercial activity for a long period of time. In fact, the government did come up with a new master plan of 2021, which allowed mixed use and commercial activity in many of the areas, which were designated as residential. Despite this new master plan which took away the *raison de etre* of the sealing orders, the court ordered the sealing to continue even in such areas on the basis that their owners had given undertakings that they would stop the commercial activity by 30th June/30th September 2006. The court said that they could not be permitted to "violate" their undertaking, despite the fact that the new master plan permitted them to use their premises for commercial purposes.

The courts orders created havoc and panic in the city and many questioned the excessive zeal with which the court supervised and monitored the sealing drive. More than a lakh shops and commercial establishments were shut down during the time and were forced to shift to shopping malls and commercial complexes. The prices of shops and offices in the shopping malls and commercial complexes doubled and tripled almost overnight making many people question whether the sealing drive was being undertaken for the benefit of the Mall and Commercial complex developers. All this is a matter of public record. What is not publicly known is that during this time that these orders were being made by Justice Sabharwal, his two sons, Chetan and Nitin who until then had small export import businesses, had entered into partnerships with big Mall and Commercial complex developers and had become big Commercial complex developers themselves.

Here are the facts, which have been dug out essentially from documents filed by Chetan and Nitin Sabharwal with the Department of Company affairs. Till 2004, the Sabharwals owned 3 companies ostensibly doing small time export import business, whose profits were in lakhs. These were named, Pawan Impex, Sabs exports and Sug exports. Interestingly, their registered offices were at the Sabharwals' family home at 3/81 Punjabi Bagh. In January 2004 they were shifted to Justice Sabharwal's official residence at 6 Moti Lal Nehru Marg. Could it be a coincidence that on 7th May 2004, Justice Sabharwal had ordered the sealing of properties where industries had been running in residential areas? Obviously, a strict implementation of his order would have required the sealing of his Punjabi Bagh residence, but his official residence could hardly be sealed. However, on 23rd October 2004, the promoter of one of the biggest developers of shopping malls and commercial complexes (Kabul Chawla of the BPTP group) was inducted in Pawan Impex as a 50% shareholder and Director. On the same day, the registered office of Pawan Impex was shifted back to 3/81 Punjabi Bagh. Soon thereafter, on 12/2/05, Kabul Chawla's wife, Anjali Chawla was also inducted as Director.

On 8/4/05, Chetan and Nitin set up another company, Harpawan Constructors, this time with the object of constructing Commercial complexes. On 25/10/05, Purshottam Bagheria, another big builder of Delhi was inducted as a partner in this new enterprise. Soon after entering into partnership with the Sabharwals, Bagheria soon went on to announce his plans to develop "Square 1 Mall", in Saket which was touted as one of the largest and most luxurious Malls in Delhi.

By 16th February 2006, when then Chief Justice Sabharwal passed the tough order setting in motion the sealing of commercial establishments operating in residential areas of Delhi, his sons were well on their way to entering the business of Malls and

commercial complexes in a big way, having sewn up partnerships with two of the biggest Commercial estate developers in Delhi. This Commercial complex development business of the Sabharwals really took off thereafter. On 21/6/06, the share capital of Pawan Impex was increased from Rs. 1 lakh to Rs. 3 Crores. Immediately thereafter, on 30/9/06, the Chawlas of BPTP developers invested Rs.1.5 Crores (50%) in the company. On 22/8/06, Pawan Impex was given a loan of 28 Crores by the Union Bank of India, Connaught Place. The loan was secured by Mortgaging the “plant, machinery and other assets” lying at plot Nos A 3, 4, & 5 in Sector 125, Noida. There is no plant or machinery at these plots. Instead, a huge I.T. park (5 lac Sq Ft, worth hundreds of crores) is being constructed there by BPTP. When questioned about this, the General Manager of the Union Bank asserted that the Sabharwals had matched this by putting in 28 Crores of their own. When questioned further about this, he explained that this consisted of 3 crores of Share Capital, 7 Crores of unsecured loans! And 18 crores of “projected income from prospective buyers!” If every bank were as liberal to give loans on the security of projected income from prospective buyers, we would have had non-performing assets of several lakh crores.

Interestingly, these 3 huge plots of 12,000 Sq. Metres in a prime sector of Noida were allotted to Pawan Impex on 29 Dec 2004 by the Mulayam Singh/Amar Singh government of U.P. at a rate of only Rs. 3,700/sq Metre, when the market price of commercial land here was at least Rs. 30,000/sq Metre at that time). This is itself a largesse of at least 30 Crores. These are however not the only plots in Noida allotted to the Sabharwals. Another huge commercial plot of 12,000 sq metres (plot 12A, in Sector 68, which appears to have been carved out later as an afterthought) was allotted to the other Sabharwal Company, Sabs exports, as recently as 10 November 2006, at a price of 4000 Rs/sq metre, when the market price of commercial plots there was at least 10 times as much. This meant a largesse of another 50 Crores! But these are not the only plots allotted at throwaway prices to the Sabharwals. Sabs exports was earlier on 6, Nov 2000 allotted another 3 plots (C103, 104 and 105) of 800 Sq M each in Sector 63 at a rate of Rs. 2,100 each, when the market price was several times that. They also appear to have other plots in Sector 8 Noida, where they have recently constructed a fancy factory and Office Complex. This is on top of the allotment of a House Plot in the fancy Sector 44 of Noida to Justice Sabharwal’s daughter in law, Sheeba Sabharwal in 2005. This was part of the infamous Noida allotment scam, where the media exposed that most allotments were made to V.I.P.s in a supposed draw of lots. Embarrassed by this exposure, the allotments had to be cancelled by the U.P. Government. Curiously, the CBI investigation into the allotments ordered by the Allahabad High Court was immediately stayed by Justice B.P. Singh of the Supreme Court. In this context, it is also very significant that the publication of the infamous Amar Singh tapes, which showed him involved in various crimes and sleaze was stayed by Justice Sabharwal himself on the matter being merely mentioned before him.

Thus, from owning small time export import firms till 2004, the Sabharwals in just two years time, got into the business of developing Commercial complexes and appear to be rolling in money. All this happened during the time when Justice Sabharwal was a senior judge and then Chief Justice, dealing with the sealing cases and passing orders which directly stood to benefit his sons and their partners. In this context, it is noteworthy that the Sabharwal sons Chetan and Nitin, have recently in March 2007, purchased a 1150 sq Yard bungalow, (B-9 Maharani Bagh, from the heirs of former Law Minister Jagannath Kaushal) for a stated consideration of Rs.16 Crores!

The IT Dept has finally woken up and has send a notice on 28th May 2007 to Pawan Impex seeking details of their business activities, accounts, assets, sources of funds etc. The matter however is more serious than that. The conduct of Justice Sabharwal and his sons appear to involve offences and misdemeanors beyond the Income Tax Act. In the first place, it was totally improper on his part to have heard the sealing case and passed orders in it, since his sons clearly stood to benefit from his orders. His orders are against the principles of natural justice, which say that no judge can hear a case in which he is

personally interested. There was a serious conflict of interest in this case which renders his orders a nullity. It is in fact arguable that his dealing with this case in such circumstances involves an offence under the Prevention of Corruption Act.

In any case, the connections between the Mall and commercial complex developers need to be thoroughly probed, particularly to see how and to what extent they funded the activities and acquisition of assets of the Sabharwals. The acquisition of the entire assets of the Sabharwals needs to be thoroughly examined to see whether their acquisition can be legitimately explained. And the allotment of all the several plots to the companies or relatives of Justice Sabharwal needs to be investigated to see if undue favour was shown to them and if so whether there was any quid pro quo in terms of judicial orders.

We are conscious of and acknowledge the fact that Justice Sabharwal was a very competent judge, who during his tenure as a judge, issued some very exemplary orders on many issues. But that cannot absolve him from the misconduct highlighted above.

The facts thrown up in this case have very disturbing implications about the integrity of our judiciary in the highest places. It is bound to shake public confidence. Only a thorough investigation with full transparency will satisfy the public conscience. We call upon all the authorities including the government and the judiciary to ensure that a transparent, thorough and credible investigation into all the above aspects takes place and the full facts are placed before the people of this country.

This case also underlines the need for a National Judicial Commission (which is independent of the executive and the judiciary) with an investigative machinery under its control, which can investigate complaints against judges and take disciplinary action and initiate criminal action against them. The Campaign for Judicial Accountability and Reforms calls upon all sections of society to put pressure on Parliament and the government to bring a suitable Constitutional Amendment Bill for this purpose.

JUSTICE SABHARWAL'S DEFENCE BECOMES MURKIER: STIFLING PUBLIC EXPOSURE BY USING CONTEMPT POWERS

Press Release : *New Delhi 19th September 2007*

Justice Sabharwal finally broke his silence in a signed piece in the Times of India. His defence proceeds by ignoring and sidestepping the inconvenient and emphasizing the irrelevant if it can evoke sympathy. To examine the adequacy of his defence, we need to see his defence against the gravamen of each charge against him.

Charge No. 1.

That his son's companies had shifted their registered offices to his official residence.

Justice Sabharwal's response:

That as soon as he came to know he ordered his son's to shift it back.

Our Rejoinder:

This is False. In April 2007, in a recorded interview with the Midday reporter M.K. Tayal he feigned total ignorance of the shifting of the offices to his official residence. In fact, the registered offices were shifted back from his official residence to his Punjabi Bagh residence exactly on the day that the BPTP mall developers became his sons partners, making it very risky to continue at his official residence. Copies of the document showing the date of induction of Kabul Chawla, the promoter and owner of BPTP in Pawan Impex Pvt. Ltd., one of the companies of Justice Sabharwal's sons, and Form no. 18 showing the shifting of the registered office from the official residence of Justice Sabharwal to his family residence on 23rd October 2004.

Charge No. 2:

That he called for and dealt with the sealing of commercial property case in March 2005, though it was not assigned to him. It is only the Chief Justice who can assign pending cases to various judges. He was not the CJI at that time.

Justice Sabharwal's response:

Justice Sabharwal does not answer this charge.

Charge No. 3.

That he did this exactly around the time that his sons got into partnerships with Mall and commercial complex developers, who stood to benefit from his sealing orders. The chain of events is as follows:

On 23rd October 2004, Kabul Chawla, the promoter of one of the biggest developers of shopping malls and commercial complexes, was inducted in Pawan Impex as a 50% shareholder and Director. On 12.02.2005, Kabul Chawla's wife, Anjali Chawla was also inducted as Director of Pawan Impex. On 17th March 2005, Justice Sabharwal ordered that the case dealing with the sealing of commercial establishments should also be heard along with the writ of M.C. Mehta, which was being heard by him. On 8th April 2005, Chetan Sabharwal and Nitin Sabharwal, two sons of Justice Sabharwal, set up another company, Harpawan Constructors, with the object of constructing Commercial complexes. On 25th October 2005, Purshottam Bagheria, one of the big builders on shopping malls and commercial complexes of Delhi was inducted as a partner in Harpawan Constructors. On 16th February 2006, Justice Y. K. Sabharwal, who by that time had become the Chief Justice of India, passed a detailed order in the aforementioned case setting into motion the demolition and sealing in Delhi.

Justice Sabharwal's response:

That they were his sons friends. That Harpawan Constructors which was set up by his sons with the Mall developer Purshottam Bagheria did not do any business. In fact the courts under him got Bagheria's 1 MG road mall demolished. That his sons are not developing shopping malls but only an IT Park.

Our Rejoinder:

If so many Mall and commercial complex developers were his sons' close friends, then he should not have dealt with the case anyway since that creates an immediate conflict of interest. Moreover, why should they go into partnership with these developers who stood to benefit from Justice Sabharwal's orders, and that too exactly at the time when he seizes control of the sealing of commercial property case and starts dealing with it. He says that the company set up by his sons in partnership with Bagheria has not done any business. If so, why was this new company set up for developing commercial complexes in partnership with this builder? In an interview with ZNews Justice Sabhawal claims credit for the judiciary under him ordering the demolition of the illegal 1 MG road mall owned by Bagheria. But then why do his sons enter into partnerships with such an illegal builder whose buildings have had to be demolished by the Judiciary? And immediately after this partnership with the Sabharwals, Bagheria went on to announce the construction of "Square 1 mall" in Saket as the most fashionable mall in India. And all the fashion designers who had their shops and outlets at 1 MG road went on to buy space in the Square I mall. What is important to note here is that Bagheria and his partners at 1 MG road had already parted with all the space on 1 MG road. The demolition thus hurt the designers and others who had bought shops there, but did not hurt Bagheria who may have in fact benefited from it by clearing the land of his tenants and getting them to buy space at his new malls at Saket and elsewhere.

An IT park is also a commercial complex like any other. Many commercial establishments sealed were IT centres and BPOs which were forced to buy space in IT parks like that being constructed by his sons and their partners.

Charge No. 4.

That the Union Bank of India gave a loan of 28 crores to his sons' company Pavan Impex on a collateral of plant and machinery and other moveables at the site of their proposed IT Park, which were non-existent.

Justice Sabharwal's response:

That his sons' had a credit facility of 75 crores.

Our Rejoinder:

If that were the case, what was the need for mortgaging non-existent assets for obtaining this loan? Moreover, the Banks' senior manager is on record saying that the loan was given on the basis of projected sales to prospective customers.

Charge No. 5.

That because of the obvious conflict of interest, he could not have dealt with this case.

Justice Sabharwal's response:

That his orders have never benefited his sons.

Our Rejoinder:

His orders of sealing lakhs of commercial properties clearly forced those establishments to buy or rent space in commercial complexes like those that his sons' company was constructing; and shopping malls etc that their friends and partners were constructing. There was a clear conflict of interest and his orders have clearly benefited his sons and their partners.

Charge No. 6.

That a large number of industrial and commercial plots were allotted in Noida by the UP government to his sons' companies, at prices far below the market price. In particular several huge plots were allotted between December 2004 and November 2006 by the Mulayam Singh/Amar Singh government, while he was dealing with Amar Singh's tapes case, and had stayed the publication of those tapes on the behest of Amar Singh.

Justice Sabharwal's response:

That some of the plots were allotted by earlier different governments. That the prices were not far below the market price. That the allotments were made in the normal course to his sons who were entrepreneurs and were providing employment to hundreds of people in Noida.

Our Rejoinder:

Even if one were to look at only the last two allotments of 12,000 metres each made in December 2004 and November 2006, made by the Mulayam Singh/Amar Singh governments, it is obvious that the allotments are definitely not in the normal course. Consider the allotment to Pawan Impex. The company has Nil turnover and Nil business (as declared in their application) on the date of application on 30/12/04. The very next day they receive a letter from Noida Authority asking them to come for an interview within 4 days on 5/11/04. On that day the authority notes that they want 12,000 sq. M in Sector 125 or Sector 132. The minutes note that because the work of development of Sector 125 is not complete and because in sector 132 the plot size available is only upto 11,000 sq metres, the matter is deferred for the next meeting. In the next meeting on 13/12/04, though Sector 125 is still not developed, a decision is taken to allot them a 12,000 Sq. metre plot in Sector 125 for a BPO. All this without a word about how and why a company with nil business is worthy of being allotted one of the largest plots of 12,000 sq. meters. The previous application of M/s Softedge Solutions Pvt. Ltd for an IT park is rejected on the ground that they could not satisfactorily answer questions about their previous experience in IT and their technical tie up. But Pawan Impex represented by Chetan Sabharwal with Nil business, no previous track record in IT and no technical tie up sails through with no questions asked. All in the normal course, of course! Justice Sabharwal says that the allotment price of Rs. 3,700/sq M was not below the market price. The current circle rate in Sector 125 is Rs. 11,000/sq metre and the market price is over Rs. 30,000/sq meter there.

Similarly, the huge plot of 3 acres, No. 12 A in Sector 68 allotted to Sabs Exports in November 2006 at a throw away price of Rs. 4000 per square meter is also not in the normal course and was similarly made within days of application and a bogus interview, without any other system. Today, within 10 months of allotment, even the circle rate of plots in Sector 68 is Rs. 8,000 per sq. meter and the market rate is Rs. 20-22,000 per sq. meter. Moreover this allotment has been made at a time when he was dealing with Amar Singh's tapes case and had stayed the publication of the tapes.

Charge No. 7.

That his sons have purchased a 1150 square meter house in Maharani Bagh, New Delhi in March 2007 for a consideration of 15.46 crores. The source of money for this is unexplained and in the sale deed they seek to conceal their relationship with Justice Sabharwal by writing his name as Yogesh Kumar and giving their factory address instead of the residential address.

Justice Sabharwal's response:

That 90 percent of the money for the purchase of this house was from four banks; that his sons concealed his full name in the sale deed in order to avoid taking advantage of their association with him.

Our Rejoinder:

Banks do not normally advance loans of 90% of the value of a property on its security. Otherwise they would end up holding inadequate security if the property prices fall by even 15%. If they have done so in this case, it is either because of an undue favour as in

the case of the loan of 28 Crores to Pawan Impex, or they valued the property higher than the declared purchase price. His explanation for concealing his name in the sale deed is hilarious and unbelievable since his sons did not hesitate to use his official residence as the registered office of their companies. Moreover, this was in a registered sale deed with a private party, where there was no occasion for taking any advantage by using his name.

It is therefore clear that Justice Sabharwal is guilty of serious judicial misconduct and appears to be prima facie guilty of offences under the prevention of Corruption Act which need to be investigated. It is also significant that highly respected former Judges of Supreme Court of India like Justice V. R. Krishna Iyer, Justice P. B. Sawant, Justice J.S. Verma etc. have all called for a thorough investigation into this matter. This is imperative and could be done by a panel of retired Judges and other eminent members of civil society. We call upon the Chief Justice of India to constitute such an inquiry panel and request Justice Sabharwal to co-operate with it.

Silencing exposure of judicial corruption by contempt

Meanwhile the Delhi High Court has held the staff of Mid-day guilty of contempt of Court for publishing some of the above allegations in their newspaper in May this year. This is despite the fact that they had pleaded that the allegations were all true and based on unimpeachable, authentic and verifiable documents obtained essentially from the website of the Department of Company Affairs. However, without examining Mid-day's defence of truth, the High Court held them guilty on the basis that *"The nature of the revelations and the context in which they appear, though purporting to single out former Chief Justice of India, tarnishes the image of the Supreme Court. It tends to erode the confidence of the general public in the institution itself. The Supreme Court sits in divisions and every order is of a Bench. By imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfill the ulterior design."* It may be noted that Midday's allegations were only against Justice Sabharwal and they had not even mentioned any other judge in their reports.

We regard this view of the Court as highly pernicious, which would mean that even truthful exposure of corruption in the judiciary would not be permitted. This view will make a mockery of the basic principles of our democratic republic, which is founded on the premise that the people are, the real masters and all public servants including the judiciary are working on their behalf and are accountable to them. It would also render irrelevant the amendment in the Contempt of Courts Act by which truth was made a valid defence. A statement signed by several eminent persons in this regard is being issued today and the Campaign for Judicial Accountability and Reforms also fully endorses that Statement.

SCANDAL IN THE PALACE

JUDGES IN INDIA ARE DIVINE BEINGS. AND IF YOU'RE AN EX-CJI, YOUR SINS ARE ABOVE MORTAL REPROACH...

Outlook: October 1st 2007

Arundhati Roy

Scandals can be fun. Especially those that knock preachers from their pulpits and flick halos off saintly heads. But some scandals can be corrosive and more damaging for the scandalised than the scandalee. Right now we're in the midst of one such.

At its epicentre is Y.K. Sabharwal, former Chief Justice of India, who until recently headed the most powerful institution in this country—the Supreme Court. When there's a scandal about a former chief justice and his tenure in office, it's a little difficult to surgically excise the man and spare the institution.

But then commenting adversely on the institution can lead you straight to a prison cell as some of us have learned to our cost. It's like having to take the wolf and the chicken and the sack of grain across the river, one by one. The river's high and the boat's leaking. Wish me luck.

The higher judiciary, the Supreme Court in particular, doesn't just uphold the law, it micromanages our lives. Its judgements range through matters great and small. It decides what's good for the environment and what isn't, whether dams should be built, rivers linked, mountains moved, forests felled. It decides what our cities should look like and who has the right to live in them. It decides whether slums should be cleared, streets widened, shops sealed, whether strikes should be allowed, industries should be shut down, relocated or privatised. It decides what goes into school textbooks, what sort of fuel should be used in public transport and schedules of fines for traffic offences.

It decides what colour the lights on judges' cars should be (red) and whether they should blink or not (they should). It has become the premier arbiter of public policy in this country that likes to market itself as the World's Largest Democracy.

Ironically, judicial activism first rode in on a tide of popular discontent with politicians and their venal ways. Around 1980, the courts opened their doors to ordinary citizens and people's movements seeking justice for underprivileged and marginalised people. This was the beginning of the era of Public Interest Litigation, a brief window of hope and real expectation. While Public Interest Litigation gave people access to courts, it also did the opposite. It gave courts access to people and to issues that had been outside the judiciary's sphere of influence so far. So it could be argued that it was Public Interest Litigation that made the courts as powerful as they are. Over the last 15 years or so, through a series of significant judgements, the judiciary has dramatically enhanced the scope of its own authority.

Today, as neo-liberalism sinks its teeth deeper into our lives and imagination, as millions of people are being pauperised and dispossessed in order to keep India's Tryst with Destiny (the unHindu 10% rate of growth), the State has to resort to elaborate methods to contain growing unrest. One of its techniques is to invoke what the middle and upper classes fondly call the Rule of Law. The Rule of Law is a precept that is distinct and can often be far removed from the principle of justice. The Rule of Law is a phrase that derives its meaning from the context in which it operates. It depends on what the laws are and who they're designed to protect. For instance, from the early '90s, we have seen the systematic dismantling of laws that protect workers' rights and the fundamental rights of ordinary people (the right to shelter/health/education/water).

International financial institutions like the IMF, the World Bank and the ADB demand these not just as a precondition, but as a condition, set down in black and white, before they agree to sanction loans. (The polite term for it is structural adjustment.) What does the Rule of Law mean in a situation like this? Howard Zinn, author of A People's History of the United States, puts it beautifully: "The Rule of Law does not do away with unequal distribution of wealth and power, but reinforces that inequality with the authority of law. It allocates wealth and poverty in such indirect and complicated ways as to leave the victim bewildered."

As it becomes more and more complicated for elected governments to be seen to be making unpopular decisions (decisions, for example, that displace millions of people from their villages, from their cities, from their jobs), it has increasingly fallen to the courts to make these decisions, to uphold the Rule of Law.

The expansion of judicial powers has not been accompanied by an increase in its accountability. Far from it. The judiciary has managed to foil every attempt to put in place any system of checks and balances that other institutions in democracies are usually bound by.

It has opposed the suggestion by the Committee for Judicial Accountability that an independent disciplinary body be created to look into matters of judicial misconduct. It has decreed that an FIR cannot be registered against a sitting judge without the consent of the chief justice (which has never ever been given). It has so far successfully insulated itself against the Right to Information Act. The most effective weapon in its arsenal is, of course, the Contempt of Court Act, which makes it a criminal offence to do or say anything that "scandalises" or "lowers the authority" of the court. Though the act is framed in arcane language more suited to medieval ideas of feminine modesty, it actually arms the judiciary with formidable, arbitrary powers to silence its critics and to imprison anyone who asks uncomfortable questions.

Small wonder then that the media pulls up short when it comes to reporting issues of judicial corruption and uncovering the scandals that must rock through our courtrooms on a daily basis. There are not many journalists who are willing to risk a long criminal trial and a prison sentence.

Until recently, under the Law of Contempt, even truth was not considered a valid defence. So suppose, for instance, we had prima facie evidence that a judge has assaulted or raped someone, or accepted a bribe in return for a favourable judgement, it would be a criminal offence to make the evidence public because that would "scandalise or tend to scandalise" or "lower or tend to lower" the authority of the court.

Yes, things have changed, but only a little. Last year, Parliament amended the Contempt of Court Act so that truth becomes a valid defence in a contempt of court charge. But in most cases (such as in the case of the Sabharwal...er... shall we say "affair") in order to prove something it would have to be investigated. But obviously when you ask for an investigation you have to state your case, and when you state your case you will be imputing dishonourable motives to a judge for which you can be convicted for contempt. So: Nothing can be proved unless it is investigated and nothing can be investigated unless it has been proved.

The only practical option that's on offer is for us to think Pure Thoughts.

For example:

- a. Judges in India are divine beings.
- b. Decency, wholesomeness, morality, transparency and integrity are encrypted in their DNA.
- c. This is proved by the fact that no judge in the history of our Republic has ever been impeached or disciplined in any way.
- d. Jai Judiciary, Jai Hind.

It all becomes a bit puzzling when ex-chief justices like Justice S.P. Bharucha go about making public statements about widespread corruption in the judiciary. Perhaps we should wear earplugs on these occasions or chant a mantra.

It may hurt our pride and curb our free spirits to admit it, but the fact is that we live in a sort of judicial dictatorship. And now there's a scandal in the Palace.

Last year (2006) was a hard year for people in Delhi. The Supreme Court passed a series of orders that changed the face of the city, a city that has over the years expanded organically, extra-legally, haphazardly. A division bench headed by Y.K. Sabharwal, chief justice at the time, ordered the sealing of thousands of shops, houses and commercial complexes that housed what the court called 'illegal' businesses that had been functioning, in some cases for decades, out of residential areas in violation of the old master plan.

It's true that, according to the designated land-use in the old master plan, these businesses were non-conforming. But the municipal authorities in charge of implementing the plan had developed only about a quarter of the commercial areas they were supposed to. So they looked away while people made their own arrangements (and put their lives' savings into them.) Then suddenly Delhi became the capital city of the new emerging Superpower. It had to be dressed up to look the part. The easiest way was to invoke the Rule of Law.

The sealing affected the lives and livelihoods of tens of thousands of people. The city burned. There were protests, there was rioting. The Rapid Action Force was called in. Dismayed by the seething rage and despair of the people, the Delhi government beseeched the court to reconsider its decision. It submitted a new 2021 Master Plan which allowed mixed land-use and commercial activity in several areas that had until now been designated 'residential'. Justice Sabharwal remained unmoved. The bench he headed ordered the sealing to continue.

Around the same time, another bench of the Supreme Court ordered the demolition of Nangla Macchi and other jhuggi colonies, which left hundreds of thousands homeless, living on top of the debris of their broken homes, in the scorching summer sun. Yet another bench ordered the removal of all "unlicensed" vendors from the city's streets. Even as Delhi was being purged of its poor, a new kind of city was springing up around us. A glittering city of air-conditioned corporate malls and multiplexes where MNCs showcased their newest products. The better-off amongst those whose shops and offices had been sealed queued up for space in these malls. Prices shot up. The mall business boomed, it was the newest game in town. Some of these malls, mini-cities in themselves, were also illegal constructions and did not have the requisite permissions.

But here the Supreme Court viewed their misdemeanours through a different lens. The Rule of Law winked and went off for a tea break. In its judgement on the writ petition against the Vasant Kunj Mall dated October 17, 2006 (in which it allowed the construction of the mall to go right ahead), Justices Arijit Pasayat and S.H. Kapadia said:

"Had such parties inkling of an idea that such clearances were not obtained by DDA, they would not have invested such huge sums of money."

The stand that wherever constructions have been made unauthorisedly demolition is the only option cannot apply to the present cases, more particularly, when they unlike, where some private individuals or private limited companies or firms being allotted to have made contraventions, are corporate bodies and institutions and the question of their having indulged in any malpractices in getting the approval or sanction does not arise."

It's a bit complicated, I know.

A friend and I sat down and translated it into ordinary English. Basically,

a. Even though in this present case the construction may be unauthorised and may not have the proper clearances, huge amounts of money have been invested and demolition is not the only option.

b. Unlike private individuals or private limited companies who have been allotted land and may have flouted the law, these allottees are corporate bodies and institutions and there is no question of their having indulged in any malpractice in order to get sanctions or approval.

The question of corporate bodies having indulged in malpractice in getting approval or sanction does not arise. So says the Indian Supreme Court. What should we say to those shrill hysterical people protesting out there on the streets, accusing the court of being an outpost of the New Corporate Empire? Shall we shout them down? Shall we say 'Enron Zindabad'? 'Bechtel, Halliburton Zindabad'? 'Tata, Birla, Mittals, Reliance, Vedanta, Alcan zindabad'? 'Coca-Cola aage badho, hum tumhaare saath hain'?

This then was the ideological climate in the Supreme Court at the time the Sabharwal "affair" took place.

It's important to make it clear that Justice Sabharwal's orders were not substantially different or ideologically at loggerheads with the orders of other judges who have not been touched by scandal and whose personal integrity is not in question. But the ideological bias of a judge is quite a different matter from the personal motivations and conflict of interest that could have informed Justice Sabharwal's orders. That is the substance of this story.

In his final statement to the media before he retired in January 2007, Justice Sabharwal said that the decision to implement the sealing in Delhi was the most difficult decision he had made during his tenure as chief justice. Perhaps it was. Tough Love can't be easy.

In May 2007, the Delhi edition of the evening paper Mid Day published detailed investigative stories (and a cartoon) alleging serious judicial misconduct on the part of Justice Sabharwal. The articles are available on the internet. The charges Mid Day made have subsequently been corroborated by the Committee for Judicial Accountability, an organisation that counts senior lawyers, retired judges, professors, journalists and activists as its patrons. The charges in brief are:

1. That Y.K. Sabharwal's sons Chetan and Nitin had three companies: Pawan Impex, Sabs Exports and Sug Exports whose registered offices were initially at their family home in 3/81, Punjabi Bagh, and were then shifted to their father's official residence at 6, Motilal Nehru Marg.

2. That while he was a judge in the Supreme Court but before he became chief justice, he called for and dealt with the sealing of commercial properties case in Delhi. (This was impropriety. Only the chief justice is empowered to call for cases that are pending before a different bench.)

3. That at exactly this time, Justice Sabharwal's sons went into partnership with two major mall and commercial complex developers, Purshottam Bagheria (of the fashionable Square 1 Mall fame) and Kabul Chawla of Business Park Town Planners (BPTP) Ltd. That as a result of Justice Sabharwal's sealing orders, people were forced to move their shops and businesses to malls and commercial complexes, which pushed up prices, thereby benefiting Justice Sabharwal's sons and their partners financially and materially.

4. That the Union Bank gave an Rs 28 crore loan to Pawan Impex on collateral security which turned out to be non-existent. (Justice Sabharwal says his sons' companies had credit facilities of up to Rs 75 crore.)

5. That because of obvious conflict of interest, he should have recused himself from hearing the sealing case (instead of doing the opposite—calling the case to himself.)

6. That a number of industrial and commercial plots of land in NOIDA were allotted to his sons' companies at throwaway prices by the Mulayam Singh/ Amar Singh government while Justice Sabharwal was the sitting judge on the case of the Amar Singh phone tapes (in which he issued an order restricting their publication.)

7. That his sons bought a house in Maharani Bagh for Rs 15.46 crore. The source of this money is unexplained. In the deeds they have put down their father's name as Yogesh Kumar (uncharacteristic coyness for boys who don't mind running their businesses out of their judge father's official residence.)

All these charges are backed by what looks like watertight, unimpeachable documentation. Registration deeds, documents from the Union ministry of company affairs, certificates of incorporation of the various companies, published lists of shareholders, notices declaring increased share capital in Nitin and Chetan's companies, notices from the Income Tax department and a CD of recorded phone conversations between the investigating journalist and the judge himself.

These documents seem to indicate that while Delhi burned, while thousands of shops and businesses were sealed and their owners and employees deprived of their livelihood, Justice Sabharwal's sons and their partners were raking in the bucks. They read like an instruction manual for how the New India works.

When the story became public, another retired chief justice, J.S. Verma, appeared on India Tonight, Karan Thapar's interview show on CNBC.

He brought all the prudence and caution of a former judge to bear on what he said: "...if it is true, this is the height of impropriety...every one who holds any public office is ultimately accountable in democracy to the people, therefore, the people have right to know how they are functioning, and higher is the office that you hold, greater is the accountability..." Justice Verma went on to say that if the facts were correct, it would constitute a clear case of conflict of interest and that Justice Sabharwal's orders on the sealing case must be set aside and the case heard all over again.

This is the heart of the matter. This is what makes this scandal such a corrosive one. Hundreds of thousands of lives have been devastated. If it is true that the judgement that caused this stands vitiated, then amends must be made.

But are the facts correct?

Scandals about powerful and well-known people can be, and often are, malicious, motivated and untrue. God knows that judges make mortal enemies—after all, in each case they adjudicate there is a winner and a loser. There's little doubt that Justice Y.K. Sabharwal would have made his fair share of enemies. If I were him, and if I really had nothing to hide, I would actually welcome an investigation. In fact, I would beg the chief justice to set up a commission of inquiry. I would make it a point to go after those who had fabricated evidence against me and made all these outrageous allegations.

What I certainly wouldn't do is to make things worse by writing an ineffective, sappy defence of myself which doesn't address the allegations and doesn't convince anyone (Times of India, September 2, 2007).

Equally, if I were the sitting chief justice or anybody else who claims to be genuinely interested in 'upholding the dignity' of the court (fortunately this is not my line of work), I would know that to shovel the dirt under the carpet at this late stage, or to try and silence or intimidate the whistle-blowers, is counter-productive. It wouldn't take me very long to work out that if I didn't order an inquiry and order it quickly, what started out as

a scandal about a particular individual could quickly burgeon into a scandal about the entire judiciary.

But, of course, not everybody sees it that way.

Days after Mid Day went public with its allegations, the Delhi high court issued suo motu notice charging the editor, the resident editor, the publisher and the cartoonist of Mid Day with Contempt of Court. Three months later, on September 11, 2007, it passed an order holding them guilty of criminal Contempt of Court. They have been summoned for sentencing on September 21.

What was Mid Day's crime? An unusual display of courage? The high court order makes absolutely no comment on the factual accuracy of the allegations that Mid Day levelled against Justice Sabharwal. Instead, in an extraordinary, almost yogic manoeuvre, it makes out that the real targets of the Mid Day article were the judges sitting with Justice Sabharwal on the division bench, judges who are still in service (and therefore imputing motives to them constitutes Criminal Contempt): "We find the manner in which the entire incidence has been projected appears as if the Supreme Court permitted itself to be led into fulfilling an ulterior motive of one of its members.

The nature of the revelations and the context in which they appear, though purporting to single out former Chief Justice of India, tarnishes the image of the Supreme Court. It tends to erode the confidence of the general public in the institution itself. The Supreme Court sits in divisions and every order is of a bench. By imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfill the ulterior design."

Nowhere in the Mid Day articles has any other judge been so much as mentioned. So the journalists are in the dock for an imagined insult. What this means is that if there are several judges sitting on a bench and you have proof that one of them has given an opinion or an order based on corrupt considerations or is judging a case in which he or she has a clear conflict of interest, it's not enough. You don't have a case unless you can prove that all of them are corrupt or that all of them have a conflict of interest and all of them have left a trail of evidence in their wake. Actually, even this is not enough. You must also be able to state your case without casting any aspersions whatsoever on the court. (Purely for the sake of argument: What if two judges on a bench decide to take turns to be corrupt? What would we do then?)

So now we're saddled with a whole new school of thought on Contempt of Court: Fevered interpretations of imagined insults against unnamed judges. Phew! We're in La-la Land.

In most other countries, the definition of Criminal Contempt of Court is limited to anything that threatens to be a clear and present danger to the administration of justice. This business of "scandalising" and "lowering the authority" of the court is an absurd, dangerous form of censorship and an insult to our collective intelligence. The journalists who broke the story in Mid Day have done an important and courageous thing. Some newspapers acting in solidarity have followed up the story. A number of people have come together and made a public statement further bolstering that support. There is an online petition asking for a criminal investigation. If either the government or the courts do not order a credible investigation into the scandal, then a group of senior lawyers and former judges will hold a public tribunal and examine the evidence that is placed before them. It's all happening. The lid is off, and about time too.

SABHARWAL ON TRIAL

Times of India: 13th September 2007

V.R. Krishna Iyer

The Constitution has vested the Supreme Court with the power to impose correctives on the executive and, in lesser measure, on the legislature. The more the power, the greater the responsibility that goes with it.

Hence, judges, more so the Chief Justice of India (CJI), are expected to set high standards of integrity. They should not be immune from public criticism and legal action in a situation of culpable delinquency on or off the bench. I look at the alleged misconduct of former CJI Y K Sabharwal with no predisposition one way or other. I hold every judge, particularly a CJI, in high esteem and view allegations of misconduct with initial scepticism.

But when the charges are grave and a former chief justice like J S Verma and senior advocates like Shanti Bhushan and Prashant Bhushan come out in support of them, they cannot be wished away as idle rumour.

American jurist Judge Jerome Frank wrote: "The best way to bring about the elimination of these shortcomings of our judicial system...is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts".

The truth of the allegations against Justice Sabharwal should be established by a high-level, responsible inquiry. Judges, including chief justices, have been victims of media accusations, which have at times been found to be baseless, malignant and motivated, and at other times unhappily true, with no action taken subsequently. Sons and close relations have benefited from proximity to sitting judges - I called it sonstroke long ago.

Years ago, chief justices made an informal code of conduct for judges. Even so, judges with a bad record have got away, even securing promotions. Justice Sabharwal is charged with using judicial power to further the business interests of his sons. If true, this misconduct deserves condemnation, as it violates the credibility and majesty of the CJI's office.

The Campaign for Judicial Accountability and Reforms (CJAR) has made serious charges against Justice Sabharwal. First, he took control of the case relating to commercial properties in residential areas of Delhi just around the time his sons entered into a partnership with shopping mall and commercial complex developers and got into that business themselves.

Second, he passed orders soon thereafter to seal such commercial establishments, which in turn drove them to the shopping malls and commercial complexes built around Delhi, thereby increasing their market price.

Third, the Mulayam government in Uttar Pradesh allotted commercial plots to his sons' companies at prices below the market rate at a time when Justice Sabharwal was dealing with its cases, including the one pertaining to Amar Singh's tapes. Though Justice P B Sawant (former judge of the Supreme Court), Justice H Suresh (former judge of the Bombay high court) and I are on the board of patrons of the CJAR, we were not party to its inquiry or, for that matter, even informed about it. The facts are, however, verifiable. Justice Sabharwal's sons are said to be businessmen who allegedly rose to rapid riches because of their father's judicial eminence.

These are matters that demand an impartial enquiry. Such a body has to be appointed by the CJI and none less. If Justice Sabharwal wants to deny the charges, he should be given the opportunity to do so. I gather that Justice Sabharwal has denied the charges in The Times of India. I suspend my judgment until an inquiry is conducted by a body preferably comprising eminent individuals in the judiciary and civil society. I appeal to Justice Sabharwal to cooperate in such an inquiry. It is in his interest as well as the judiciary's that his name is cleared. He has a duty to speak where silence may be seen as guilt. Caesar's wife must be above suspicion; judges of India are in the same position.

SHOCKING ABUSE OF JUDICIAL POWER

The Hindu: 24th September 2007

Editorial

The Delhi High Court's action in holding the editor, the publisher, the resident editor, and a cartoonist of *Mid Day* (published from Delhi) guilty of contempt of court for making allegations of gross judicial misconduct against the former Chief Justice of India Y.K. Sabharwal and sentencing them to four months' imprisonment raises several troubling issues. In the first place, it draws pointed attention to the absence of an effective and credible institutional mechanism to deal with allegations of misconduct made against judges of the high courts and the Supreme Court. Secondly, it represents an instance of improper use of the contempt power to bar any attempt to raise the issue of judicial misconduct even at the threshold. Thirdly, and most importantly, it underlines the danger to freedom of expression that the judiciary's virtually untrammelled contempt jurisdiction poses. If the object of the order was to protect the dignity and reputation of the judiciary from unfounded allegations, it has in fact strengthened the impression that the judiciary as an institution has much to hide and thus undermined its credibility in the eyes of the public.

For some time now, leading lawyers and the Campaign for Judicial Accountability and Judicial Reforms have been making two broad allegations against Mr. Sabharwal. One is that his orders on sealing irregular commercial premises in residential areas of Delhi were ultimately to the benefit of two business associates of his sons who were engaged in developing commercial complexes and malls; because of the sealing drive, property values and rents went up in those areas. The second charge is that even as he heard the case relating to the tapes said to contain recorded conversations of the Samajwadi Party General Secretary Amar Singh and passed an interim order staying their broadcast, the Uttar Pradesh government allotted his sons plots of land in Noida at rates that were a fraction of the market prices. Mr. Sabharwal after his retirement, noting that silence was no longer an option, rebutted these charges point by point in a newspaper article. His contention was that his sons had built up a large and diversified garment export business on their own; that they themselves did not benefit in any way from the sealing orders; that they were in the business of developing information technology complexes rather than commercial complexes; and that their business partners were long time friends. As for the land allotments, they were done in the normal course under different chief ministers and at prices charged for similar plots allotted in the area. The truth behind the allegations can be established through an enquiry or through judicial proceedings in a defamation suit, for instance. It is strange that even after Mr. Sabharwal showed he was perfectly willing to defend himself in a public forum, the Delhi High Court took upon itself the task of defending his dignity and that of the Supreme Court. It is stranger still that the court should have chosen to make an example of *Mid Day* through contempt proceedings while the lawyers who made the same charges in public forums were left untouched.

In this case, the journalists pleaded justification by truth as a defence and offered to prove the allegations they had published. The Delhi High Court sidestepped the issue of truth and instead argued that the article had created the impression that "the Supreme Court permitted itself to be led into fulfilling an ulterior motive of one of its members" and had thereby tarnished the image of the institution as a whole. It was after a long and hard campaign by public-spirited lawyers and the media that the traditional position was overturned and truth came to be allowed as a defence in contempt cases through an amendment to the Contempt of Courts Act in 2006. It is shocking that the principle of fairness embodied in the amended Act was totally ignored.

The *Mid Day* case has served to highlight the threat to freedom of speech from the judiciary, with the courts imposing wholly unreasonable restrictions by invoking what Justice V. R. Krishna Iyer once memorably characterised as their “vague and wandering jurisdiction with uncertain frontiers” in contempt cases. Quite apart from the built-in unfairness in a judge acting in his own cause, serving as prosecutor, judge, jury, and hangman, a great deal of uncertainty marks the offence of “scandalising the court.” If one were to look at past judgments for guidance, one would find liberal sentiments that justice is not a cloistered virtue, that judges are not immune from criticism, and that the shoulders of the judiciary are broad enough to shrug off any insult. Alongside such attitudes, there are some ominous edicts on the majesty of the law, that the contempt power is not meant to protect an individual judge but rather the institution of the judiciary and that public faith in the judiciary ought not to be allowed to be undermined by scurrilous writers. As several high profile cases, including two involving Arundhati Roy have shown, in contempt more than in other areas of law the individual predilections of judges — how liberal or how touchy they are — go to determine guilt. Courts in the United Kingdom have long let the penal provision for the offence of scandalising the court fall into disuse, and it is time Indian courts abandoned it as well. Never justified under any circumstances, its use to silence critics of possible judicial misconduct would seem to be particularly indefensible. In protecting and enlarging the rights of citizens and in guarding against abuse of executive power, the judiciary as an institution has served the country exceedingly well. Overzealous defenders of judicial dignity only serve to erode its credibility.

LAW AND BEHOLD!

Hindustan Times 24th September 2007

A.G. Noorani

It cannot be stated sufficiently strongly that the public life of persons in authority must never admit of such charges being even framed against them. If they can be made, then an inquiry, whether to establish them or to clear the name of the person charged, is called for.' What was sauce for Bihar's Chief Minister KB Sahay is sauce also for the former Chief Justice of India YK Sabharwal under CJI M Hidayatullah's ruling. The charges are specific. Public interest mandates an enquiry. A CM is subject to checks. A CJI to none.

That is the heart of the Mid-Day case. A citizen's right to publicise charges on the strength of documents and demand a probe. Mid-Day published on May 2, 2007, a report alleging that Justice Sabharwal "who nearly demolished half of Delhi to stop commercialisation of residential areas, had three commercial companies owned by his sons running from his official residence at 6, Motilal Nehru Place in New Delhi". It reproduced his denial of knowledge. The writers Vitusha Oberoi and MK Tayal [Editor and City Editor respectively] sought his explanations. "When questioned if the shifting of the registered office (of the companies from Punjabi Bagh residence) to Motilal Nehru Place was legal, Justice Sabharwal hung up."

Further reports appeared on May 18, 19 and 23. Pleas for probes by lawyers and others were published on May 19. Anand said, "If it's true he should be brought to book and must be prosecuted. This man demolished the whole of Delhi." However, on May 21, Anand placed before the Delhi High Court a copy of the issue of May 18 in which was published: "he alleged that a scandalous article maligning the former Chief Justice of India and tending to lower the image of the judiciary". Justices RS Sodhi and BN Chaturvedi issued showcause notices to the writers and to the printer and publisher SK Akhtar. On May 25, Anand filed a copy of the issue of May 19 which carried a cartoon by M Irfan Khan.

They pleaded 'truth in the public interest', a defence explicitly permissible under an amendment to the Contempt of Courts Act; the reports were based on documents available on the website of the Registrar of Companies; Sabharwal was no longer in office; Sabharwal should not have sat on the bench which passed sealing orders on businesses which benefited his sons who invested in malls.

On September 11, the court held the four guilty of contempt of court and sentenced them to four months imprisonment on September 21. There was justified uproar at the result. Mid-Day's reports said less than did a press release of August 3, issued by the Campaign for Judicial Accountability and Reforms, with 15 annexures of supporting documents. Its patrons comprise judges like Justice VR Krishna Iyer, lawyers like Shanti Bhushan and public figures like Arudhati Roy and Admiral RH Tahiliani. It was entitled 'whither judicial accountability?The case of Justice Sabharwal: disquieting facts, disturbing implications'. Its criticisms are valid. "While the power of higher judiciary has greatly increased... Its accountability has been gradually reduced... A draconian contempt law has been used to silence any public and media scrutiny of judicial misconduct." It sets out succinctly facts regarding the sealing orders and the "havoc and panic" they caused. "Many questioned the excessive zeal with which the Court supervised and monitored the sealing drive. More than a lakh shops and commercial establishments were shut down... and were forced to shift to shopping malls and commercial complexes... The prices of shops and offices in ... malls doubled and tripled almost overnight making many people question whether the sealing drive was being

undertaken for the benefit of mall and commercial complex developers. All this is a matter of public record. What is not publicly known is that during this time that these orders were being made by Justice Sabharwal, his two sons Chetan and Nitin, who until then had small export import business, had entered into partnerships with big mall and commercial complex developers and had become big commercial complex developers themselves."

It adds, "From owning small time export import firms till 2004, the Sabharwals in just two years time, got into the business of developing commercial complexes and appear to be rolling in money. All this happened during the time when Justice Sabharwal was a senior judge and then Chief Justice, dealing with the sealing cases and passing orders, which directly stood to benefit his sons and their partners."

All it asks for is "a thorough investigation with full transparency" and a National Judicial Commission with power to "investigate complaints against judges and take appropriate action". No such body exists even in a case of a brazen corruption. The impeachment process and the in-house mechanism are shams. The Government of India Act, 1935, provided for inquiry by the Federal Court. Justice S.P. Sinha of the Allahabad High Court was removed from office in 1949 for 'judicial misconduct'. The court propounded a good test. Sinha's judgements in two cases "were of such a nature as to induce a belief in the mind of the public that they were actuated by corrupt motives".

Public criticism is the only check on judicial conduct. In 1952, a bench of five of the Supreme Court's most distinguished judges ruled: "The article in question is a scurrilous attack on the integrity and honesty of a judicial officer, specific instances have been given where the officer is alleged to have taken bribes or behaved with impropriety to litigants who did not satisfy his dishonest demands. If the allegations were true, obviously it would be to the benefit of public to bring those matters into light." Truth was accepted as a defence. In 1993, a bench of three judges held it was not, without referring to the ruling by a larger bench. So much for judicial discipline. In its wake, a series of rulings on contempt followed, each against the citizens; most notably, in Arundhati Roy's cases in 1999 and 2001 in unjudicial language.

In 1969 Lord Salmon said, "If there is a just cause for challenging the integrity of a judge... it could not be contempt of court to do so. Indeed it would be a public duty to bring the relevant facts to light".

Instead, it has expanded its own power flouting constitutional limitation and built a fence for its own protection. In 1991, the court directed that no criminal case should be registered against judges of the High Court or the Supreme Court "unless the CJI is consulted in the matter". If he holds that it is not a fit case for proceeding under the Prevention of Corruption Act, "the case shall not be registered". Dissenting, two judges pointed out that it was for Parliament not the Court, to issue the fiat in "a naked usurpation of legislative power in a virgin field". This is particularly true of its rulings on appointment to itself and to High Courts, which give it a decisive voice flouting the Constitution.

SECURING JUDICIAL ACCOUNTABILITY

FREEDOM OF SPEECH VS. CONTEMPT

TOWARDS AN INDEPENDENT JUDICIAL COMMISSION

Prashant Bhushan

The judiciary in the country today has come to enjoy enormous powers. It is not only the arbiter of disputes between citizens, between citizens and the State, between States and the Union, it also in purported exercise of powers to enforce fundamental rights, directs the governments to close down industries, commercial establishments, demolish jhuggis, remove hawkers and rickshaw pullers from the streets, prohibits strikes and bandhs etc. In short, it has come to be the most powerful institution of the State.

Every other institution of the State is accountable to the anti corruption agencies, and to the judiciary which has the power of judicial review over every executive and legislative action. Moreover, the political executive is accountable to the legislature and the legislature is democratically accountable to the people-that at least is the theory of our constitutional scheme.

However, when it comes to the judiciary, we find that it is neither democratically accountable to the people, nor to any other institution. The only recourse against a judge committing judicial misconduct is impeachment, which has been found to be a totally impractical remedy. To initiate the impeachment process one needs the signatures of 100 Lok Sabha or 50 Rajya Sabha M.P.s. This one cannot secure unless two conditions are satisfied. First, one must have conclusive documentary evidence of very serious misconduct against a judge. And second, the evidence and the charges must have been publicized, such that it has assumed the proportions of a public scandal. Till that happens, there are few M.P.s who are willing to put their signatures on an impeachment motion.

Most M.P.s or their parties have cases in court, and nobody wants to invite the wrath of the judiciary. We have learnt this from the experience of several instances where judges were sought to be impeached on compelling documentary evidence of serious misconduct.

However, the media is afraid and unwilling to publicise the charges against judges (even when they have documentary evidence to back the charges) because of the fear of contempt of Court, which constantly hangs as a sword over their necks. Unfortunately, this has not changed even after truth has been specifically incorporated as a defence in the Contempt of Courts Act, as has been starkly demonstrated by the case of Justice Sabharwal.

Mid Day had carried a series of articles in May and June this year showing how Justice Sabharwal passed the orders of sealing commercial properties in residential areas in Delhi after his sons had got into partnerships with at least two of the leading shopping mall and commercial complex developers of Delhi. These orders stood to directly benefit his sons and their partners by pushing the sealed shops and offices to shopping malls and commercial complexes and thus driving up their prices. Mid Day published much of the documentary evidence in support of this huge story exposing what appeared to be a scandalous conspiracy at the Apex of the judiciary. Yet neither any other media organization, nor any judicial, executive nor legislative authority as much as batted an eyelid on this story. Thereafter, on 3rd August, the Campaign for Judicial Accountability, led by several eminent persons held a press conference and released a detailed chargesheet containing as many as 7 serious charges against Justice Sabharwal, each backed with documentary evidence. The story was still blacked out by the media. It was

finally gradually picked up by the mainstream media after the courage shown by Tehelka and Karan Thapar who carried major stories on it. The story however hit the headlines in the mainstream media only after the conviction of 4 Mid Day journalists by the Delhi High Court for contempt.

All this shows the enormous fear in the media of contempt, which has effectively deterred it from investigating, pursuing and publishing stories of judicial misconduct and corruption. If there are few reports of corruption in the higher judiciary, it is not because it is rare, but because it does not get investigated or reported by the media. Thus, if you have evidence of corruption by a judge, there is not much that you can do about it. You cannot get it exposed because of the fear of contempt, in the absence of which, even impeachment is a non starter. You cannot even register an FIR against the judge under the prevention of Corruption Act, because of an embargo created by the Supreme Court in 1991 by means of a judgement where they held that no judge can be subjected to a criminal investigation without the prior written consent of the Chief Justice of India. In the 16 years since that judgement, not even a single FIR has been registered against a sitting judge.

On top of this is the attempt by the judiciary to insulate themselves from the right to Information Act. This they have sought to do by either not appointing public information officers or by framing rules, which effectively deter information seekers. Many High courts such as Allahabad and Delhi ask for an application fees of Rs. 500 as opposed to Rs. 10 in other public authorities. Many have framed rules which prohibit the disclosure of information on administrative and financial matters. Thus, information about appointment of Class 3 and 4 employees by the High Court (which are usually made arbitrarily without issuing any advertisement or following any procedure) was denied by the Delhi High Court by citing their illegal rules which are in total violation of the RTI Act. They are emboldened to make such rules with the realization that a petition to challenge the rules would also come before them.

This has effectively led to a situation of total impunity in the higher judiciary. Not only are corrupt judges effectively insulated from any action against them, they have also protected themselves from public exposure of wrongdoing by using the threat of contempt.

Using contempt power to deter exposure

The law of contempt has often been to punish outspoken criticism and exposure of judicial misconduct. In Arundhati Roy's case, the Supreme Court convicted her and sent her to jail for writing in an affidavit that the Court's earlier contempt notice to her, Medha Patkar and Prashant Bhushan on an absurd contempt petition showed a "disquieting inclination on the part of the court to silence criticism and muzzle dissent". And the bench, which sent her to jail for this totally justified criticism was headed by the same Justice Patnaik at whom her critical remarks were directed. This is one of the problems with the exercise of this totally arbitrary power. It allows a judge to sit in judgment over his own cause. That is another reason why this newly introduced defence of truth does not solve the problem with this jurisdiction of the court. You may have to prove the truth of your allegations against a judge before him!

The Mid Day journalists were convicted despite their offering to prove the truth of all their allegations. The High Court held that the truth of the allegations was irrelevant since they had brought the entire judiciary into disrepute. It held that: "The nature of the revelations and the context in which they appear, though purporting to single out former Chief Justice of India, tarnishes the image of the Supreme Court. It tends to erode the confidence of the general public in the institution itself. The Supreme Court sits in divisions and every order is of a Bench. By imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfill the ulterior design"

All this underlines the need to do away with this jurisdiction of punishing for “scandalizing the court or lowering the authority of the court”. Such a jurisdiction does not exist in the US where only acts, which constitute a “clear and present danger to the administration of justice”, are considered to be contempt of Court. Even in UK, as far back as in 1899, the Privy Council had said that courts in England “are satisfied to leave to public opinion, attacks or comments derogatory or scandalous” of their judges and their courts. But since the judges were dealing with a British colony, they added a rider to their opinion, that “in small colonies consisting principally of coloured populations, the enforcement in proper cases for committal of contempt of court for attacks on courts may be absolutely necessary to preserve in such a community, dignity and respect for the court.” It is this argument used by the Privy Council for colonies of coloured populations, which is still being used by our judiciary today for seeking to retain this power of punishing for contempt any criticism or exposure of judicial misconduct as “scandalizing the court”. It should be obvious to anyone that respect for the courts cannot and does not depend on the existence of this power. It depends entirely on how the actions of the judges and the courts are perceived by the people. It would be fair to say that every exercise of this power to punish a criticism, however fierce, of a judge or court, will only bring the judge and the court to greater contempt and public ridicule. This power can only be used to stifle criticism and exposure of misconduct. The time has therefore come to expressly do away with this power by amending the Constitution and the Contempt of Courts Act.

Towards an independent national judicial commission

The judiciary claims that any outside body having disciplinary powers over them would compromise their independence. They claim that they have set up an “in house mechanism” for investigating and taking action on complaints against judges. It is this “in house procedure” which is sought to be given statutory status by the proposed Judges Inquiry Act Amendment Bill 2006. One major problem with the “In house procedure” is that judges regard themselves as a close brotherhood, and are reluctant to take action against those they regard as their brothers and with whom they sit and interact every day inside and outside the courts. Moreover, they feel that exposing bad apples among them would reflect poorly on the judiciary as a whole. That is why most complaints (even serious ones made with documentary evidence) against judges are just brushed under the carpet and not investigated or inquired into. There are other problems with the bill too.

The complainant is required to disclose the source of information of every part of his complaint. He can also be sent to jail by the judges committee if they feel that the complaint is frivolous or *malafide*. All this will effectively ensure that hardly anyone will summon the courage to make a complaint to this in house body of judges. Moreover, even if the in house body find a judge guilty of serious misconduct, they will only recommend impeachment and the matter will again go for voting to Parliament, which can be frustrated by partisan political considerations as happened in the Ramaswami case. Also, the judge has been given a right of appeal to the Supreme court even after Parliament votes to remove him. All this will ensure that no judge will be removed till he retires.

This underlines the need to have a totally independent constitutional body called the National Judicial Commission, which will have the power to investigate charges against judges and take action against them. The Campaign for Judicial Accountability has suggested that this could be constituted in the following manner: A chairman selected by all the judges of the Supreme Court. Another member selected by all the Chief justices of the High Courts. Another member selected by the Cabinet. Another member selected by a committee comprising the Speaker of the Lok Sabha, the leaders of opposition in the Lok Sabha and the Rajya Sabha. A fifth member to be selected by a committee comprising, the Chairman NHRC, the CAG and the CVC. Once selected, the members of

the NJC would enjoy a fixed tenure of 5 years so that they would not be under the control of any authority. This commission would have an investigative machinery under their control through which they could get charges against judges investigated. Thereafter, if they find evidence of misconduct, they would set up a 3 member committee to hold a trial of the judge. If they find him guilty, the NJC could recommend appropriate action against him, which would then be mandatory. The matter need not go to Parliament. Whatever the details of this body, the time has certainly come to put in place a totally independent body, which can investigate and punish judges for judicial misconduct.

The Judicial Commission could also be used to select judges for appointment to the High courts and the Supreme Court. They could also be empowered to transfer judges between the High Courts. This power of appointment and transfer was appropriated by the Supreme Court by an inventive interpretation of the words “in consultation with the Chief Justice of India”. They said that in order to preserve the independence of the judiciary, the primacy in the matter of judicial appointments must remain with the judiciary. Unfortunately however, since then, the process of selection and appointment of judges has hardly improved, and become even more opaque. It is also perceived to be largely arbitrary and nepotistic. We definitely need a much more transparent and credible system of appointments. The National Judicial Commission, being a full time body, could devote the requisite time to select the best candidates by following a fair and transparent system, which methodically examines the merits of possible candidates on some laid down criteria. That would also free the appointment system from the control of the government and the nepotistic influence of the judiciary.

A powerful judiciary without accountability is not only an anathema to our Constitution but also a recipe for disaster for our democracy. The situation needs to be urgently rectified: It is to discuss these important and burning issues of our times that this seminar has been organized. We hope that the political leaders, jurists, journalists and leaders of civil society who participate in this seminar would arrive at a consensus on these issues and would create the public opinion and provide the leadership for bringing about the necessary changes in the Constitution, the laws and our judiciary.

REPORT ON THE SEMINAR ON JUDICIAL ACCOUNTABILITY

13TH OCTOBER 2007

Indian Society for International Law, Bhagwan Das Road, New Delhi

Chairperson

Mr. Shanti Bhushan.

Main speakers:

Mr. V.P.Singh, Former Prime Minister,
Justice J. S. Verma, Former Chief Justice of India,
Mr. Arun Shourie, Former Cabinet Minister and Former Editor of Indian Express
Mr. A.B. Bardhan, General Secretary of CPI
Mr. Ram Jethmalani, Former Law Minister
Mr. Sharad Yadav, President Janta Dal (U)
Mr. Sitaram Yechuri, Member Polit Bureau, CPI (M)
Mr. P.C. Alexander, Member Rajya Sabha and Former Governor of Maharashtra
Mr. Dinesh Trivedi, Leader Trinamool Congress, Rajya Sabha
Mr. Vinod Mehta, Editor Outlook
Ms. Arundhati Roy, Writer and Social Activist
Mr. Kamal Mitra Chenoy, Member Central Committee, CPI

Introduction

Mr. Prashant Bhushan made the opening remarks to the convention pointing out the immense power the Judiciary enjoys today and its concomitant lack of accountability to the People.

He referred to the scope of judicial power and the fact that the courts today pass orders on a wide array of matters, including whether rivers should be interlinked, the kind of fuel to be used in vehicles, whether jhuggis and hawkers should be removed from Delhi or whether rickshaw pullers should be allowed to plough on the streets of Delhi etc. Today the judiciary can perhaps be called the most powerful institution of the State, and yet if one were to look at its accountability to the people, one would find that whatever little level of accountability the judiciary once had has now shrunk to nothing due to various reasons and developments that have taken place over the years.

To begin with, he pointed out that the Constitution makers, in order to keep the judiciary independent of the Executive and the Legislature, had prescribed a very stringent procedure in the Constitution for taking action against judges and removing them through the impeachment procedure. He referred to the Justice Ramaswami case where an impeachment motion was actually signed by more than 100 MPs, and was consequently admitted by the Speaker, Lok Sabha. Thereafter an inquiry committee of 3 judges was appointed who held a trial of the judge and infact even found him guilty. The entire process however ended in a failure, as he was not removed. Mr. Bhushan also referred subsequent attempts to impeach other judges, which failed. He pointed out that for a motion of impeachment to be successful it is imperative that one has unimpeachable documentary evidence of very serious misconduct against the judge, and secondly that the charges against the judge are publicized to the point that it assumes the form of a public scandal.

In most cases, however, it is very difficult to find documentary evidence of misconduct against a judge as a result of which one cannot even prepare an impeachment motion

and even when one does on the basis of some strong documentary evidence, it is next to impossible to get the motion signed by a hundred MPs of the Lok Sabha or fifty MPs of the Rajya Sabha because the charges are not publicized because of the fear of contempt in the media. Furthermore he went on to state that the two major constraints suffered by the media, while reporting corruption in the judiciary, were firstly the fear of contempt and secondly because often, due to the nature of the media, it is amenable to being 'managed' and as was evident in some cases in which some sections of the media had prepared the entire charge sheet against the judge and had also prepared pages of their newspaper in which all of it was to be published but was not published because the newspaper was thereafter 'managed'.

The second level of the problem was further compounded by the judgement, which came in Veeraswamy's case in 1991, which said that an FIR cannot be registered for a criminal investigation against a judge without the prior written permission of the Chief Justice of India which, it has been found in every such case, is not forthcoming.

The third level of the problem of judicial accountability is this fear of contempt. The Contempt of Courts Act makes it contempt to scandalize the court or lower the authority of the court. This jurisdiction has unfortunately been used in a manner such that any exposure of misconduct or any exposure of dishonesty in any section of the judiciary is considered to be ex-facie contempt.

Earlier, the judiciary had taken the view that truth was not a defence to "lowering the authority of the court". After a long struggle, however, Parliament amended the Contempt of Courts Act to provide that truth shall be a defence however the words used are that 'truth may be used to as a defence provided it is in good faith and bonafide'. However the problem with this is that very often the same judge against whom the allegation is made issues the notice for contempt and hence he has to decide whether the allegations made against him are bonafide and in good faith or not and then decide whether he should allow the defence of truth to be taken or not. Taking view of the Mid-Day case, where the court considered the allegations made against the former Chief Justice by a daily newspaper based on documentary evidence obtained from government websites itself, said that they would not go into the truth or otherwise because by making such allegations the entire judiciary had been scandalized. Furthermore the Court came to the conclusion that by imputing motives against the former Chief Justice, the "contemnors" had also imputed motives against his brother judges even though the Mid-Day reports did not mention anything about the other judges and therefore, held them guilty of contempt and sentenced them to prison for four months.

The fourth level of the problem has been created by the judiciary's response to the Right to Information (RTI) Act. The RTI Act is meant to apply to all public authorities, including the Judiciary and is in fact expressly stated to be so however despite this, some High Courts have not even framed rules or appointed Public Information Officers (PIO) under the RTI Act. Punjab and Haryana High Court is yet to appoint PIOs, two years after the RTI Act came into force. Other High Courts have framed rules, which are completely contrary to the Act. Delhi High Court rules say no information on administrative or financial matters shall be given. The RTI Act does not exempt information on administrative or financial matters but the Delhi High Court has framed rules to that effect. They are emboldened by the fact that if one were to challenge the rules one has to approach the Court itself and hence no other authority would have been able to frame such rules, which are in the teeth of the Act. The Judiciary is also seeking to protect itself from disclosure of information. For instance, some judges told us that Chief Justices routinely appoint class IV employees without following any procedures, in complete violation of article 14. When the Delhi HC was asked under the RTI Act to give a list of Class IV employees appointed in the last ten years and the procedure followed for their appointment. The Delhi HC replied that this information would not be disclosed.

The Executive today has a vested interest in not having a functional judiciary, because

they feel if the judiciary is functional and honest it would hold them to account for their misdeeds. The Judiciary has developed a vested interest due to the failed judicial system as a result, this business of arbitration. Most retired judges with very few honorable exceptions, which has become an enormously expensive process, which cannot be resorted to by a common person. These retired judges charge Rs. 50,000- 1 lakh as arbitration fees.

He concluded by adding that this seminar can serve the purpose of the process of building a common consensus on at least two issues:

The need to further amend the Contempt of Courts Act and delete the part of 'scandalizing the court' and 'lowering the authority of the court' from the definition of criminal contempt. And secondly,

To have an independent Constitutional Body called the National Judicial Commission. The contours of that body, the exact composition of that body can be discussed.

Panel discussion

*Shri Shanti Bhushan
(Former Law Minister of India)*

Mr Shanti Bhushan addressed the panel discussion by stating that the subject being discussed in the form of judicial accountability is the basis on which the future of democracy rests. Unless a totally efficient and totally honest judiciary in this country is created, which is devoted to the cause of the people, democracy will not be able to survive the way we want it to survive. He further brought attention to the deplorable state of affairs in the judiciary by quoting that a former chief Justice of India a few years ago had said that 20 percent of the higher judiciary is corrupt which is a matter of total disbelief, but also that some people feel it was a gross understatement to put that level at 20%.

*Shri V P Singh
(Former Prime Minister of India)*

Shri V P Singh began with endorsing the idea of the formation of a National Judicial Commission. Regarding the appointment and selection procedure, he suggested that this very committee could be involved. He further talked about the provision in the Constitution that there shall be All India Judicial Services. Stressing that there is already an existing provision and all these appointments till now are being made under an ad hoc provision. He pointed out that when there is a specific provision, its time we picked it up from the Constitution, as it is in no party's manifesto, it's a proposal coming out of the constitution itself. He added, if we have it under the auspices of this Judicial Commission, we can sensitize both. He concluded by strongly supporting the Right to Information as a right we must protect and one which empowers people.

*Justice J S Verma
(Former Chief Justice of India)*

Justice Verma began by pointing out that now the rule of law is the bedrock of democracy and the judiciary has been entrusted with this pious duty or obligation of ensuring proper implementation of rule of law then naturally the significance of our responsibility need hardly be emphasized. He continued further that unless we have the moral authority, merely legal sanction or legal authority is not going to help. He further suggested that to make a new law to ensure an effective mechanism to enforce judicial accountability at the highest level also but it must be ensured that judicial accountability as a facet of the independence of judiciary and therefore, it should be

consistent with the concept of independence of judiciary and it must ensure the protection of the honest and correct kind of judges. Whatever mechanism is chosen, it must be ensured that it is not simply a way to hound the judges but also to protect the honest and good judges. Justice Verma questioned, if the Supreme Court makes a direction asking all election candidates to declare their assets and very rightly, then why should not the judges do it? Why should records related to the appointment of judges not be disclosed after the appointment has been made?

Once there is transparency/openness that itself will enable public scrutiny. The fact that there is public scrutiny will act as an internal check and a check against arbitrariness. This is the kind of system, which our Constitutional philosophy has. After all transparency is the reason for the Right to Information Act.

On the composition of the National Judicial Commission he suggested that both the Judiciary and the Executive should be a part of it but he argued that we have seen both instances of Executive primacy and Judiciary's primacy. He suggested if there be someone who belongs to neither, should be appointed to chair the independent body.

He concluded that the way he has understood the contempt power, even before the amendment was made is - if a person is speaking the truth, our Constitutional philosophy does not punish speaking the truth. He continued by quoting the words *satyameva jayate* written everywhere but if *satya* is the biggest tragedy then what is one talking about- and we are the biggest hypocrites. Now we have it as an express provision by amendment. If we judges do not rise to the occasion and do the needful then the erosion of independence of judiciary by outside interference is bound to come for reasons for which we would be responsible

Shri Arun Shourie

(Former Cabinet Minister and Former Editor of Indian Express)

He began by pointing out that to learn that the judiciary has framed formal rules to block disclosure of information is just a step in the direction of destroying public confidence. Also that the in-house mechanism does not work and more so if the public comes to believe that the judiciary is acting as a brotherhood then the confidence of the public in that mechanism is going to be absent. Therefore affirmed that the Independent Judicial Commission is very timely and necessary. He brought a very important point into notice that this Independent Judicial Mechanism must have an investigated mechanism of its own. Some rules should also be framed in which the triggering of the inquiry is automatic and it must be the counterpart of day-to-day hearing in this case if I'm charged with something then it is my responsibility as a sitting judge to furnish all evidence without any delay to the investigating agency. He strongly supported that this must be followed by the harshest possible punishment. Also if any frivolous allegations are made against anybody then you can compound the penalty to any extent. This will be in the interest of the honest judge and in the interest of the institution because any suspicion left hanging in the air is more corrosive than any fact, which will be established by subsequent inquiry. He concluded by subscribing to both the proposals with regard to the mechanisms as well as with regard to changes in the Contempt of Court Act and also suggesting that reformation is in the hands of those who are the beneficiaries of the present system- the judiciary, the press or the legislatures, therefore, only recourse is great public pressure for any changes we wish to make.

Shri Ram Jethmalani
(Former Law Minister of India)

Mr Jethmalani began by saying that it is one of his personal regrets that we don't have a strong government. In his opinion the quality of judges appointed earlier was much better than the quality of judges appointed after these collegiums. Our founding fathers and the Constitution makers never thought that Judiciary would reach to this point. He

said that 20% of the superior judiciary is corrupt, what is worse he further emphasized is that there must be something wrong with the remaining 80% who saw to it that the 20% corrupt people have ascended the bench. He continued by a dictum that ultimately it is the character of men who work a particular system that makes a system either a success or a failure. That there is a systemic failure is itself a myth. It is an escape route for people, who are incompetent, corrupt and who have no intention of either removing their incompetence or getting rid of the corrupt elements in their own thought processes. Some incompetent judges will be there, one can't expect all judges to be competent, but a corrupt judge is a disaster! He continued by questioning if judges were actually a brotherhood, and came to a conclusion that they are in fact a corrupt trade union. He followed his line of argument by questioning that when there is a judge who has been charge sheeted why is it that, that judge's case is not being heard in the last ten years. Why are the judges silent about a case where a judge is the accused person? Such criminal cases are pending for the last couple of years. Why doesn't the case restart? He wittingly added that such a judgment would create a nice precedent if a judge of the High Court is found guilty and sentenced and he must be sentenced to twice the punishment, which you would give to a normal citizen.

The condition today of the judiciary is a conspiracy between a corrupt government and a corrupt minister wanting corrupt judges of his choice, and prayed that such a conspiracy must end. He suggested that such a conspiracy must be terminated by popular opinion. He concluded by adding that only those people can stand against such corrupt judges and the government who are ultimately willing to sacrifice everything to meet this end, the people of this country and the members of the bar must spot these people. Nothing is worth living for unless it is worth dieing for- that's the principle of life.

Shri A B Bardhan
(General Secretary of CPI)

Since we are here discussing the judiciary, who are nowadays coming out with all sorts of judgments, I want to draw your attention to two or three issues. First of all the whole idea of judicial activism also should have been dealt with here. You have started by correctly saying that the Executive, the Legislature, and the Judiciary are the three pillars of our Constitution. Our entire democratic polity stands on these three pillars but there is a very serious attempt now being made in the name of judicial activism for the judiciary to trespass into fields that are reserved for the legislature and the executive. They maybe failing in their duties, they are, we are critical of them as much as anybody else but then the question arises – is the judiciary not failing in its duties? Thousands of cases are piling up. Judgments are delivered on very serious matters after 10 years, 14 years etc. When the matter is no longer there you dig them up and deliver judgments including death sentences, life sentences. I think the judiciary should first of all should mind its business, before it tries to trespass in to the field of the executive and the legislature.

Shri Shanti Bhushan
(Former Law Minister of India)

I agree that judges, normally, the majority who come from upper caste are sub-consciously biased in favour of upper caste, and therefore there is need for securing representation of all sections of society even in the judiciary, including at the highest level. But if you carefully consider the composition of the National Judicial Commission, which has been suggested; two members are required to be nominated, one by the Union cabinet and one by the leader of Opposition in the Loksabha in consultation with the other opposition groups in the two houses. I'm sure as the recent Constitutional Amendments have shown all political parties are interested in the caste, namely OBC, SC and therefore I expect that when the Union Cabinet appoints its nominee on the National Judicial Commission they would see to it that an eminent member of a

particular backward caste will be nominated by them. Similarly, the leader of the Opposition will also see to it that an eminent member either of the SC or OBC is to be nominated. Once two members belonging to these castes are in the National Judicial Commission, out of five, I think they would be able to see that no injustice will be done to those caste groups also.

Sitaram Yechury
(Member Polit Bureau, CPI(M))

I'm here on behalf of the Communist Party of India – Marxist to extend our support to the issue of judicial accountability and reforms and the National Judicial Commission. That no system can work unless you have character is a fact! But the point is that in the name of strength of character to deny the evolution of a new system, which can be effective that I think is actually subscribing to the status quo and allowing it to continue.

The beginning of our preamble, where we say, “We the people of India” give to ourselves this Constitution, I think, defines in itself the centrality of people’s will in our Constitutional framework - this centrality of the people’s will cannot in my opinion be encroached upon by any organ. According to this framework the judiciary has the right of judicial review not judicial activism. Through judicial activism the judiciary is encroaching upon the centrality of people’s will, which is our Constitutional framework.

Therefore it is a much larger issue that encroaching upon the territory of a Legislature or the Executive but by doing so, the Supreme Court is doing all kinds of things from calibrating the heights of speed breakers, I was recently in Kolkata, where the High Court ordered the shifting of a bus stop from the Victoria Memorial, which is where they all come in the name of environment etc; the concerns maybe correct but in whose domain are these? Where the Executive has to take a decision the judiciary’s encroachment in the name of judicial activism is there for all of us to see.

If the Executive is not efficient and is ceding space, I think the judiciary’s responsibility is to throw it back on the lap of the Executive saying it is your job, you decide and not encroach on that saying that since you’re not doing it - let me do it for you. Judicial activism actually negates the Legislators supervision of the Executive and thereby it negates, ultimately, the supremacy of the will of the people. It is the legislature that embodies the will of the people and if that will of the people cannot be exercised in the supervision of the Executive misrule or misconduct then the will of the people is being sacrificed because those decisions have moved out of the Executive’s domain into the Judiciary.

The system being proposed through the National Judicial Commission includes representatives from the executive, from the legislature from the judiciary and also from the bar. Let this Commission be formed - it is the way forward. Therefore, there is an urgent need to correct the imbalances that have arisen. We have reached a stage where the process of maturity of Indian democracy has to be taken forward. Many people bemoan coalition governments are regressive to democracy; I say no coalition governments is actually maturation of our democracy because our social plurality cannot be contained in a political monolithic order.

P C Alexander
(Member Rajya Sabha & Former Governor Maharashtra)

On the subject of a National Judicial Commission and its relevance to accountability, which is the theme of this conference. I have considered this meeting as very timely as you are aware the 2006 Bill – Judges Enquiry Bill as it is called has been before the Parliament for nearly two years now and it has been referred to a Standing Committee and the report of the Standing Committee has been sent back to the Parliament. This is

the time when public opinion should be expressed on the idea of the Judges Enquiry Bill 2006 and particularly on the idea of a Judicial Commission at the national level, which according to many of us is absolutely necessary to make the concept of judicial accountability meaningful. The five provisions in the Constitution have made independence of the judiciary very much in favour of the occupants of these positions of even judges in our country. Nobody will object to the idea of recognizing the independence of judiciary because its an article of faith as far as democracy is concerned so independence of the judiciary is accepted but our contention is that independence of the judiciary is not incompatible with accountability the two need not be contradicting each other and that judges will retain their independence and in fact their independence will gain greater respect and acceptability in a democracy if they are also made accountable- accountable to the people of this country; not accountable to the legislature per say or to the law minister or to the Prime Minister. In all cases in a system of democracy that is followed in our country in all cases, accountability is ultimately to the people.

The proposal we are considering today is that there is no way of ensuring accountability of the judiciary unless there is a comprehensive legislation creating a body, which is empowered not only to correct the errors committed by them or to award minor measures or recommend major punishment or removal but also to select and appoint judges. The power to recommend transfer of judges from one place to the other then the power of maintaining enforcing discipline will follow and they can provide such punishments themselves or recommend the awarding of punishments through the President and finally they can recommend impeachment. This is the need and importance of a National Judicial Commission.

Shri Shanti Bhushan
(Former Law Minister of India)

The question whether apart from impeachment the judges were subject to other punishments was squarely answered by the Constitutional bench in the Justice Veeraswamy case. An argument was raised on behalf of Chief Justice Veeraswamy before the Supreme Court that even an Indian Penal Code when it provided for a public servant being punished for accepting legal gratification was not applicable to the judges and the judges could not be prosecuted under the law. Thankfully the Constitutional bench turned down this argument and squarely held that not even a judge of the Supreme Court was an exception from the law contained in the Indian Penal Code regarding corruption and that they were liable to being prosecuted for corruption and sent to jail but what they did in that judgement was that it is very necessary to maintain the independence of the judiciary that we should provide in this judgement that not even an FIR can be registered against a judge for any offence even corruption and only the Chief Justice can permit the registration of FIR. Judicial Commission could have two separate wings; each consisting of five persons; each being constituted in the same manner but one wing of five persons will deal only with appointments and the other wing again consisting of five other members; both wings have security of tenure; dealing with any complaints against these members; and the National Judicial Commission should have an independent investigating machinery not depending on the CBI or any other police wing but their own wing of investigators directly under them only so that they could get the matters investigated and the evidence collected against those persons.

Dinesh Trivedi
(Leader Trinamool Congress, Rajya Sabha)

I have come primarily to express solidarity with the cause. I came here to be enlightened and to learn and I have learnt a lot but at the same time I have not learnt anything new! I was a little concerned that whatever I may say will be in contempt of either Court or the Parliament. But I have a great defence now in me, even anybody hauls me up for

contempt, I'll say you go and catch Mr. Ram Jethmalani and then come to me. After listening to him this morning, I am not worried at all.

My suggestion is that we have system that records the arguments being presented in court, verbatim, like we have in Parliament. Perhaps, in this day and age all the proceedings can be video recorded. We must have total transparency – today we have parliamentary proceedings being telecast live, the scenes are very ugly but the fact is its being shown. I once again express my solidarity and support for the cause.

Shri Shanti Bhushan
(Former Law Minister of India)

I'm glad you mentioned that after listening to Mr. Ram Jethmalani you feel secure that no proceedings for contempt can be lodged against you because you have a ready defence. In fact the only reason why people are afraid of contempt even when they speak the truth is because of the fear of imprisonment, which the judges have terrified them with. They have to loose that fear and they are loosing that fear and by the end of the seminar they would have lost that fear as you have.

Gandhiji has said there are two kinds of laws. Some laws are just and some laws are unjust. You have a duty to obey the just a laws but you also have a right to disobey the unjust laws. And I would say, we the people and also the media must remember this.

Kamal Mitra Chenoy
(Professor JNU, Member Polit Bureau, CPI)

I speak here as a student of political science, particularly of the Constitution and of Human Rights.

In India, increasingly the Supreme Court has allocated to itself powers not only powers of appointing people in a charmed circle, promoting nepotism. In fact the selection of University judges is more rigorous than the selection of judges. Their publications are examined, their previous work is examined they face a rigorous interview, sometimes with 100 competing candidates and that's how they are selected but the judiciary has become a truly charmed circle. And partly for this one must blame the fourth estate. The romantic way in, which Public Interest Litigation was reported and not followed up; so if there was a hearing on Narmada or the Indira Sarovar Project but bad follow up or no follow up, that did not get press publicity. On the other hand since the judges were getting more and more powerful they began exercising their right of contempt to everyone. Some problem in a State, summon the Chief Secretary, law and order problem, summon the DGP and anything. You could be a writer and because what you said irked their majesty, their Lordship the judge- you were sentenced to contempt.

Now in a country where the truth cannot be said about, say a Chief Justice who has made profits from a judgement on sealing and if this is contempt for which one may go to prison then its very much like the freedom struggle. People went to prison during the freedom struggle because they felt they had a duty to speak. I think we have a duty to speak. Judicial Accountability will not come only because of a good law but because there are people who are willing to fight for and stand up for that good law even after it is enacted. And that will always mean that since the Judiciary inherently is a conservative force that there will be a clash within the judiciary. I'm not a lawyer and so I will not professionally tangle with the judiciary but I certainly feel it my right and my duty as a citizen and as a social scientist to speak the truth as I see it – that is what I was trained for. And any judiciary, which tries to stop that is trying to deprive me of the freedom, people like Gandhiji, Nehru and Ambedkar and other fought for and got. I don't see how they have this right; but an entire mystique has been built around the judiciary, that no other institutions function only the judiciary function but how often have the news

papers reported how many lakhs of cases are pending in the Supreme Court, High Courts or the Sessions Courts?

The people who people the Supreme Court and the High Court are themselves not above court. I think the Commission on Judicial Accountability is a pressing need because not only do we not have a judiciary that is accountable but also because we have a judiciary that is partially accountable to vested interests. So the letter and spirit of the Constitution is being subverted by this kind of judiciary.

There was a detailed press conference on Justice Sabharwal I know one reporter of a leading national daily who filed a report. The editor who is generally progressive refused to publish that report scared of contempt. We have to do something about this. We have to get some spine into the fourth estate. They can do their other rackets, making TRPS and all that in what they do but what happens to reporting what senior judicial persons, senior lawyers, retired judges, when they are pointing out a crime and a very serious crime that too by a Chief Justice? Without any report being published on Justice Sabharwal, he is given an Op-Ed page to reply. Why? So I really think this is a question critical and crucial to democracy.

Arundhati Roy
(Writer, Activist)

We have been discussing this morning about truth as a defence and now even the law allows for it but in the Mid-Day judgement they have become even more ludicrous. There is a philosophical question here, which is truth? It's not limited to legal documents that prove that somebody has taken money or somebody has molested a woman. These are not the only truth. And really we are talking about an Institution that has become in many ways a corporate tool and so that too is a truth. Ideology is also something that we should be allowed to discuss and to me almost as dangerous as the fact that you have corrupt judges making decisions in favour of major Corporations or major Financial Institutions for a bribe, almost as dangerous is the fact that they could be making it for ideological reasons. Of course there is nothing one can do about that by legislation but certainly we should be allowed to discuss it, like we can discuss all other kinds of politics out in the open.

There is plenty of historical documentation on what the judges have been up to. If you look at some of the judgments, its not just corruption as I said the lack of logic, intellect, the lack of inability to communicate what you are thinking - sometimes I feel like doing a talk called 'why shouldn't I have contempt for court?' because we expect higher standards. I don't think literature has suffered from criticism, I don't think criticizing a writer or a filmmaker or an artist is an insult to literature. It helps! Similarly, I think we should be allowed to say what we feel about this Institution and the people who run it. If I were asked, what would be the one thing that ought to change, I would say that this is the most powerful institution in this country and it has to be accountable to us.

Anupam Gupta
(Senior Advocate, High Court at Chandigarh)

I have flirted with contempt all my professional life, ever since I joined the bar in 1980. It's only very recently that I actually came face to face with it. The chilling effect of contempt is worse than the law or the jurisprudence of it. There is nothing in contempt but this fear of contempt and I would join you Arundhatiji whenever you decide to put aloft on a banner, in whatever way you wish to speak or write about it – why should I not have contempt for the court? For all that it requires is abandoning fear, a quality or a characteristic or an imperative, a moral imperative, which the Mahatma treated as an article of faith throughout his life and for which he laid down his life. I completely agree with my distinguished elder Shri Shanti Bhushanji that all that it requires to face up to

contempt is to treat it with contempt.

Once this attitude is adopted and we renounce that fear nothing remains of contempt. I believe Shanti Bhushanji and Prashant and the other valiant souls who joined hands with them gave a brilliant demonstration of the renunciation of fear in the Mid-Day case; just as Arundhati gave it in her case a couple of years ago. Renounce that fear; nothing remains of the law of the sledgehammer of contempt.

Vinod Mehta
(*Editor Outlook*)

I've come here to express my solidarity with the seminar. We all in the media were very outraged when four journalists from Mid-Day were sentenced to four months imprisonment. That itself provoked a whole campaign and several sections of society got involved with that Campaign. The whole question of contempt and scandalizing the court has not become an issue at the top of the public mind and I think this debate should not stop at the fate of the four journalists. I think the judiciary itself is quite embarrassed by what they have done and they would like to defuse that particular problem in the hope that the larger problem of contempt of court that we are also fighting is ignored and brushed away.

As for this other issue about 'who will judge the judges' and the constitution of the National Judicial Commission, everyone is on your side. How do we take this debate forward, who do we get involved? I was just thinking that once you involve politicians in this, I think, it's a double-edged sword. When you pit politicians against the judiciary, public opinion will always back the judiciary against the politician. The issue of accountability is lost and a private fight ensues between the judiciary and the politicians. I suggest we involve civil society more actively and keep the role of politicians minimal.

Sum up

Since the morning we have heard an enunciation of positions on the issues surrounding us on this generic issue of judicial accountability by particularly powerful political leaders of the country also several eminent leaders of the bar, a former Chief Justice of this country who was also frank and forthright. There has been an almost unanimous consensus without exception on several key related issues of judicial accountability. First of course, there is a crying need for an institution, which can exercise disciplinary powers over judges not merely on just corruption but on every kind of misconduct. Whether its misconduct by way of exercising jurisdiction, which they do not possess in a totally arrogant manner in a totally illegal manner, or whether it is acts of other kinds of administrative or judicial misconduct. Across the board we saw complete unanimity about the composition of that Committee. There wasn't that much discussion about the exact composition of that Committee. The formulation, which has been suggested in the background paper generally found acceptable by most people however, that's a matter of detail, which can be discussed and fine-tuned in terms of what should be the exact composition of the Committee.

Another issue on which, we had near unanimity is the need to change the system of appointment. On that two things were said, generally, the first the present system of the judges exercising this power this too has failed, the previous system where the government exercised that power, though few seemed to think that the previous system was much better than the existing system, but clearly that was also not satisfactory and I think there is virtual unanimity on that as well. The most important thing said about appointments was that whatever the system is it should be totally transparent. One fine day you learn that so and so has been appointed the judge of the High Court or the judge of the Supreme Court not even recommended, but notified as being appointed the judge of the High Court or Supreme Court. Now very often this kind of opacity precludes

the possibility and very often that's a real possibility of people having information that a particular fellow is corrupt and I have evidence to show he is corrupt.

One issue that many people raised, which was not detailed in the background paper is that the system of appointments is not merely opaque but there is just no system. After all when appointments are made by the UPSC there is some system, even in England there is a Judicial Appointments Commission/Committee, which first whenever a requirement is given to them to select some judges of some court –they first draw up what are the requirements for the job, what are the characteristics that we want in a person that we want to be appointed as a judge of this Court. So the criteria's is first laid out, again a system is laid out how they will be evaluated, who are the people who would be evaluating them? Then the marks are totaled up and thereafter, the person is selected. In India at least for appointments to the higher judiciary, the High Court or the Supreme Court no such system is followed and therefore, that leads to greater possibilities of nepotism, greater arbitrariness, totally ad hoc system of appointment. Whatever the system of appointment, it must be transparent, whether you have confirmation hearings of the kind that are held through the Senate sub-committee in the US. Even if you don't have that kind of process of confirmation hearings, you must certainly have a system by which the criteria is laid out, the method of grading them on that criteria is laid out and selection is done on some rational basis and thereafter, during the process of appointment people are allowed to depose before the appointments commission or any such body created for the purpose.

Another more or less unanimous consensus to emerge was the need for this appointments committee to not be totally controlled by the judiciary or the executive, therefore, the need to have an independent body, which finally makes the appointments. On the issue of contempt, in the background paper we have argued that there is a need to delete this provision of scandalizing the court and lowering the dignity of the court from the definition of criminal contempt in the Contempt of Courts Act. I think most speakers said that this amendment of truth does not go far enough. Certainly we need further amendment to the Contempt of Court Act, Mr. Ram Jethmalani pointed out that during the formulation they had in fact agreed upon in the Parliamentary Committee anything, which is true or believed in good faith to be true by the person who has written it should not be contempt. Perhaps a majority of the people who spoke on the issue felt there is no reason for retaining this power to punish for scandalizing the court and lowering the dignity of the court, it is quite adequate to restrict it to anything, which presents a clear and present danger to the administration of justice. This whole issue of judicial accountability should go beyond the confines of the courts, lawyers and even the government. It must be debated widely across the country, particularly among common citizens, consumers of justice, the people who are really affected by the collapse of the judicial system. Its good that people represented here, today, are from a very wide cross section of civil society in this country.

CONTEMPT POWER AND SOME QUESTIONS
CONTEMPT POWER IS A CASE OF SURVIVAL AFTER DEATH; A VAGUE,
VAGARIOUS AND JEJUNE BRANCH OF JURISPRUDENCE, WHICH IS OF
ANCIENT BRITISH VINTAGE.

The Hindu 1st October 2007

Justice V.R. Krishna Iyer

The stature of the judicature is so high and its powers so wide that any action designed to debunk, defile or denigrate the great dignity and impartial integrity of the institution is regarded as an invasion on the people's faith in the court's fearless, bias-free, favour-free functionalism and its solemn credibility as a constitutional instrumentality of justice. But what happens if judges themselves commit, or the judiciary as an institution commits, what is extravagantly excessive, arbitrary, authoritarian, *mala fide* or corrupt?

The fundamental right of free speech of a free people comes into operation at that stage, and informed public criticism of judicial misconduct and incompetence or institutional turpitude or dysfunctionality creates corrective public opinion through vigilant scrutiny and media publicity. Speech is duty and silence cowardice, since information, accountability and transparency of the judiciary are inalienable attributes of any democratic institution. The judicature is a democratic sentinel of people's rights, never an impregnable fortress of authoritarianism enjoying immunity from people's speech, with fair behaviour, high integrity and great competency incorruptibly above suspicion.

Indeed, contempt law must doctrinally accept the proposition that truth of adverse allegation is a valid justification.

The great jurist Seervai observed thus:

"This raises the question whether truth is a defence to an alleged contempt of court if a person, or the Press allege and publish proof of the misbehaviour of a judge. The judgments of the Supreme Court are not in a tidy state. But a careful analysis of our Supreme Court judgments, and judgments of English and Australian Courts, shows that truth is, and must be a complete defence to allegations of bribery, corruption, bias and other misbehaviour of a Judge. To hold otherwise would be to nullify the provisions of Articles 124(4) and (5) in a practical sense, for few people would expose themselves to being committed for contempt in order to bring a corrupt judge to book. Secondly, to hold so is to put the judges above the Constitution which expressly provides for the removal of a judge for proved misbehaviour."

Judge Jerome Frank of the U.S. Court of Appeals sensibly explained that he had little patience with, or respect for, that suggestion.

"I am unable to conceive ... that, in a democracy, it can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions ... The best way to bring about the diminution of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."

“We need judges who are trained for the job, whose conduct can be freely criticised and is subject to investigation by a Judicial Performance Commission; judges who abandon wigs, gowns, and unnecessary linguistic legalisms; judges who welcome rather than shun publicity for their activities.”

“Contempt of court is the Proteus of the legal world, assuming an almost infinite diversity of forms.” Indeed, says Ronald L. Goldfarb: “Neither Latin American nor European civil law legal systems use any device of the nature or proportions of our contempt power. While critics of these systems may make preferential comparisons, so long as these countries keep well within anarchy on the one hand and totalitarianism on the other, there is room to question whether indeed this power is as necessary and essential as our decision-makers suggest.”

In sum, contempt power is a case of survival after death; a vague, vagarious and jejune branch of jurisprudence, which is of ancient British vintage. It has colonially incarnated as part of the *corpus juris* of the Indian Republic. My separate opinion in Mulgaokar’s case (1978 SC 727) has been referred to approvingly in Shiv Shanker’s case (1988 SC 1208). Chief Justice Sabyasachi Mukherjee observed:

“Krishna Iyer, J. in his judgment observed that the Court should act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judges, where the attack was calculated to obstruct or destroy the judicial process. The Court must harmonise the constitutional values of free criticism, and the need for a fearless curial process and its presiding functionary, the judge. To criticise a Judge fairly albeit fiercely, is no crime but a necessary right. Where freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it. The Court must avoid confusion between personal protection of a libelled judge and prevention of obstruction of public justice and the community’s confidence in that great process. The former is not contempt but latter is, although overlapping spaces abound. The fourth functional canon is that the Fourth Estate should be given free play within reasonable limits even when the focus of its critical attention is the Court, including the Higher Courts. The fifth normative guideline for the Judges to observe is not to be hypersensitive even where distortions and criticisms overstep the limits, but to deflate vulgar denunciation by dignified bearing, and the sixth consideration is that if the court considers the attack on the Judge or Judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of law by fouling its sources and stream.”

The dauntless and celebrated Lord Denning observed in an illustrious passage:

“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office,

we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.”

These great observations were made on a case where a politician as eminent as Michael Foot said: “Denning is an ass.” And *The Observer* gave the headline, “Why Denning is an ass.”

In a similar strain, Chief Justice P.B. Gajendragadkar (1965 SC 745) expressed a liberal view, quotationally approved by Justice Savyasachi Mukherjee:

“We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.”

Notice the further emphasis which is law binding on all courts.

“It has been well said that if judges decay, the Contempt Power will not save them and so the other side of the coin is that judges, like Caesar’s wife must be above suspicion per Krishna Iyer, J. in Baradakanta Mishra v. Registrar of Orissa High Court, (1974) 1 SCC 374: (AIR 1974 SC 710). It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalising remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy. Many today suffer from remediless evils which courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the Judges and lawyers must make about themselves. We must turn the searchlight inward. At the same time we cannot be oblivious of the attempts made to decry or denigrate the judicial process, if it is seriously done.”

Lord Atkin is a marvel of illumination of the law. He wrote:

“Whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

CRITICISM IS NOT CONTEMPT

Hindustan Times 29th September 2007

Karan Thapar

Are judges special or is justice special? To put it differently, can you criticise a judge without imperiling the sanctity of justice? This is the core concern at the heart of the debate whether freedom of speech should have primacy over the law on contempt.

My answer is clear and simple: justice is special; judges are only a means to that end. Therefore it follows you can criticise a judge without lowering or degrading the majesty of justice. If a judge feels wronged, he or she, like you or me, can take recourse to the law of libel. But I don't believe there is anything in the character of the office that should protect a judge, any more than you and I, against criticism.

As far back as 1968, Lord Denning, then Master of the Rolls in Britain and perhaps the greatest judge of our time, said of the law of contempt:

“Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest... we must rely on our own conduct itself to be its own vindication.”

To prove he meant what he said, Lord Denning not only accepted harsh criticism but even physical abuse without recourse to contempt. In his book, 'The Due Process of Law', he recounts how a Miss Stone threw books at him and Lord Diplock, a fellow judge, only to be ignored. "We took little notice", he writes. "She had hoped we would commit her for contempt of court – just to draw attention to herself. As we took no notice, she went towards the door. She left saying: 'I congratulate your Lordships on your coolness under fire'."

Our own Justice Markandey Katju, in a lecture delivered this January, has put it pithily. "If a person calls me a fool", he said, "whether inside court or outside it, I for one would not take action as it does not prevent me from functioning, and I would simply ignore the comment, or else say that everyone is entitled to his opinion. After all, words break no bones."

In the same lecture, Justice Katju explained how he would respond to criticism. "Either the criticism was correct, in which case I deserved it, or it was false in which case I would ignore it... Sometimes an honest and learned judge is unjustifiably criticised. But for one such person criticising an upright judge, one hundred people will immediately rush to his defence ... why then should judges get upset or be afraid of criticism, particularly when we are living in a democracy?"

So, then, is there ground for maintaining the law of contempt? There is, but it should be specifically intended to ensure the efficient administration of justice. As Justice Katju puts it: "The test to determine whether an act amounts to contempt of court or not is this: does it make the functioning of judges impossible or extremely difficult? If it does not, then it does not amount to contempt of court, even if it is harsh criticism... the only situation where I would have to take some action was if my functioning as a judge was made impossible e.g. if someone jumps on to the dais of the court and runs away with

the court file, or keeps shouting and screaming in court, or threatens a party or witness. After all I have to function if I wish to justify my salary.”

The time has come for us to redefine contempt. We need to guarantee the protection of justice. We don't need to protect the position or reputation of judges. And we certainly must not shelter them from criticism.

IT'S THE RIGHT OF EVERY MAN TO MAKE FAIR COMMENT

Asian Age 29th September 2007

Fali S. Nariman

A recent judgment of the high court of Delhi summarily committing to prison the editor, publisher, resident editor and cartoonist of Mid-Day for scandalising the court, has evoked strong, almost defiant, responses. Let us take stock. The origin of this branch of contempt law (known as "scandalising the court") emanates from a much quoted dictum of Justice Wilmot in his judgment in Wilkes Case — of 1765 vintage: a judgment that was never delivered! Judgment had been reserved in the case and when it was ready to be announced it was discovered that the writ against Mr Wilkes was incorrectly titled, and under the strict procedural rules of the time had to be dismissed. The judgment was later published by the judge's son when his father died: and it was then eagerly seized upon by judges in England and in the Commonwealth as laying down "law."

But then it was soon realised in the country where the doctrine first originated that this "law" was unprincipled, and tended to be heavy handed. It soon became obsolete in the UK itself — which prompted the Privy Council to say (back in the year 1899) that courts in England "are satisfied to leave to public opinion, attacks or comments derogatory or scandalous" of their judges and their courts. But since the Privy Council was dealing with a small island called St. Aubyn in the Caribbean, the judges added a rider to their opinion: acknowledging that "in small colonies consisting principally of coloured populations the enforcement in proper cases for committal of contempt of court for attacks on courts may be absolutely necessary to preserve in such a community dignity and respect for the court."

The three facets of "criminal contempt" in Indian statute law are: any publication whatsoever (i) which scandalises or tends to scandalise or lowers or tends to lower the authority of any court; or (ii) which prejudices or interferes or tends to interfere with the due course of any judicial proceeding, or (iii) which interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice in any other manner. All three items are compendiously described in the Contempt of Courts Act 1971 as "criminal contempt." Items (ii) and (iii) are necessary; they are also more than sufficient to prevent obstructions to the due administration of justice. Item (i) is wholly dispensable for the following reasons:

First, because the Law of Contempt is an exception to the fundamental right of free speech and expression guaranteed under Article 19(1)(a) of the Constitution. It must then be justified on the ground that it is a "reasonable restriction" under Article 19(2); otherwise it would be unconstitutional. This principle was never better put than in a judgment of a division bench of the Calcutta high court delivered some years ago. It correctly appreciated and applied an important Constitutional principle. In that case the court was called upon to decide whether an article in a Kolkata daily, which had condemned a prior judgment of the Calcutta high court, unread and by distorting facts, was contemptuous.

The article had the disquieting heading "Let the High Court save itself from Ignominy." A suo motu rule was issued by the judges. When it came up for hearing — no apology was called for or tendered. But the newspaper was exonerated: and the contempt notice was discharged. The judges said, "None of the articles can be defended as fair comment made in temperate language about a court case. In fact the distorted version of the judgment given and the language employed in the articles may have the effect of shaking the confidence of the people in the judiciary and thereby lowering the dignity and majesty of the law."

And yet, upholding the prime importance of freedom of speech, the Calcutta high court held that the publication was not contempt, though the judges did say that the language used could have been more polite, more sober. Freedom to criticise the judiciary (even wrongly and obtusely) was upheld as part of the cherished right of freedom of speech. And what happened? As a result of this decision heavens did not fall. The proverbial flood-gates did not open. Journalists did not go on a maligning spree: simply because restraint and wisdom on the part of the judges got a like response — restraint on the part of the press.

The judgment of the Calcutta high court makes one recall what was said by Lord Denning in a now infamous contempt case: it involved Quinton Hogg, son of a Lord Chancellor and himself a future Lord Chancellor of England. He had written an article in very critical and caustic tones, and in intemperate language about the conduct of Lord Denning in a gaming case. The litigant, one Blackburn, moved for contempt and this is what Lord Denning said, whilst dismissing the application: "Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest."

Secondly, ours is not a small country — and we have long ceased to be a "colony" for many years. Although India is inhabited with a "coloured population" (of which we are justly proud), our jurisprudence has shown that coloured people are not less respectful of the law and of the courts, than white peoples around the world.

Our judges and our courts command respect, not because of the law of contempt, but because of their bold and independent decisions. Our judges do not need the prop that "small colonies" had needed to preserve their dignity. The dignity of the judges of our courts, "rests on surer foundation."

CLEAN UP THE JUDICIARY

Times of India 12th October 2007

Shanti Bhushan

In 1993, a nine-judge bench of the Supreme Court laid down a new system for making appointments of judges to the high courts and Supreme Court. This system gave enormous powers to a collegium of senior judges of the Supreme Court to select and make recommendations to the government for these appointments. Their recommendations were also directed to be binding on the government and president.

The only right the government had was to return the recommendation once, but subsequently if it was unanimously reiterated by the collegium, it would have to be implemented. This was done on the logic that to preserve independence of the judiciary, the right to select judges must also remain with them. For the last 14 years that this system has been in place, its performance has been very disappointing. Now it appears to have totally collapsed.

The people of India deserve an efficient and clean judiciary, particularly at the apex level.

However, recent events have shown that there is considerable corruption in the judiciary, even at the top. Neither the government nor judiciary have bothered to put in place a credible, independent and transparent system for the appointment of judges and for investigating and taking action against those involved in misconduct.

The government and members of Parliament appear to be only interested in competing for power and its benefits. Even the judiciary is content to enjoy enormous power without any accountability, particularly the arbitrary power to appoint anyone they choose. It is only civil society, the consumer of justice, and the common citizen, suffering because of the virtual collapse of the judicial system in the country, who have a real stake in the matter.

The decision of the nine-judge bench was the following: "The process of appointment must be initiated well in time to ensure its completion at least one month prior to the date of an anticipated vacancy; and the appointment should be announced soon thereafter, to avoid any speculation or uncertainty. This schedule should be followed strictly and invariably in the appointment of the chief justices of the high courts and the chief justice of India (CJI), to avoid the institution being rendered headless for any significant period. In the case of appointment of the chief justice of a high court to the Supreme Court, the appointment of the successor chief justice in that high court should be made ordinarily within one month of the vacancy".

The collegium of judges, which was entrusted the power of appointments to the Supreme Court, consists of the five senior most judges of the apex court, including the CJI. It appears that many of them have their own proteges to promote and usually the best people do not get selected. They are also often at loggerheads with each other which also greatly delays the selection. The whole process is also totally ad hoc and arbitrary and no system for comparative evaluation of the suitability of the candidates is followed.

There are, at present, five vacancies in the Supreme Court alone and dozens in the high courts.

A vacancy that occurred in the Supreme Court 16 months ago has not been filled, though according to the nine-judge judgment, appointments to all these vacancies should have been announced before they occurred. Many high courts have had acting

chief justices for many months, sometimes for more than a year, a practice totally contrary to the 1993 judgment.

The time has come for civil society and the media to realise their strength and use it to compel Parliament to amend the Constitution and put in place a National Judicial Commission as a permanent body for the appointment and removal of judges. It should consist of the following five members: A chairman to be nominated by all judges of the Supreme Court; a member to be nominated by all the chief justices of high courts; a member to be nominated by the Union Cabinet; a member to be nominated by a committee of the leader of opposition in the Lok Sabha, in consultation with the leader of different opposition groups in the two houses of Parliament; the fifth member could be nominated by a committee of the chairman of the Rajya Sabha, speaker of the Lok Sabha and attorney general of India.

Since different members would be nominated by different functionaries and since they would enjoy a fixed tenure (during which they could only be removed by impeachment), they would act independently and also function as checks and balances on each other.

The judicial commission is an absolute necessity to put in place a transparent system for selecting judges for appointment. They should also have an investigative machinery at their disposal, through which they can evaluate complaints against judges and proposed candidates investigated.

Such an institution is more likely to result in the selection of proper candidates and would introduce at least a modicum of urgently needed accountability in the judiciary. We need to work to create the necessary public opinion to put pressure on Parliament to enact this constitutional amendment.

MATTERS OF POLICY: TOO MANY FINGERS IN THE PIE PUBLIC INTEREST LITIGATIONS HAVE GONE BERSERK, BUT NEW GUIDELINES AREN'T REQUIRED

Hindustan Times: 29th January 2008

A.G. Noorani

We take the optimistic view that successive Chief Justices of India shall henceforth act in accordance with the Second Judge's case and this opinion,' Justice S.E Bharucha said on October 28, 1998, delivering the Supreme Court's advisory opinion on the President's Reference. The Court ruled in that case (in 1993) that the CJI must consult two other judges before recommending judges for appointment to the Supreme Court and the High Courts. Justice Bharucha himself ignored the court's rulings after he became CJI on November 1, 2001.

An affidavit filed by the Law Ministry disclosed that "a total number of 351 additional judges have been appointed permanent judges during the period 1.1.1999 and 31.7.2007. In these cases, successive CMs have not consulted the collegium while considering the cases of appointment of additional judges as permanent judges of the High Courts and have advised appointments on their own consideration. There has been no case where an additional judge has been appointed a permanent judge after consultation with the collegium". For nine years, the 1993 judgment, gravely flawed as it was, was rendered irrelevant by the CJIs whom it gave primacy. It flouted the clear intent of the framers of the Constitution. B.R. Ambedkar told the Constituent Assembly on May 24, 1949: "To allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice of India which we are not prepared to vest in the President or the Government of the day". He proposed "a middle way", a consultative process, provided by the Constitution. The Supreme Court subverted the system. In Lord Simonds' words, this was "a naked usurpation of the legislative function under their disguise of interpretation". The judgment of 1993 enjoined consultation with two judges. In 1998, its opinion added two more. Another Bench can add yet more. A distinguished counsel and scholar, Robert Stevens holds: "Judges choosing judges is the antithesis of democracy" This is precisely what the Supreme Court did. Analysing the ruling, H.M. Seervai remarked that the majority judgment was "null and void". It is now a total wreck. In 1991 the Supreme Court held, in the case of a former CJ of the Madras High Court, K.Veerarwami, that judges are covered by the Prevention of Corruption Act. But a majority (3-2) "directed that no criminal case shall be registered" against a Judge of the Supreme Court or a High Court without the approval of the CJI. "If the Chief Justice is of opinion that it is not a fit case for proceeding under the Act, the case shall not be registered." No law contained this immunity. It was created by the judges themselves. What the Supreme Court has done in recent years is to raise a painful question. If the Court's ruling is "null and void" or otherwise demonstrably violates a provision of the Constitution, can the government or, indeed, the people, refuse to abide by it? These rulings are no aberrations. They reflect a judicial outlook and an ambition wholly opposed to democratic governance under the rule of law. In Veerarwami's case, Justice K.Jagannathan Shetty bared the outlook candidly. Justice Holmes said, "Judges do and must legislate but they can do so only interstitially."

Quoting him, Justice Shetty said "the Court's role today is much more...It is a problem solver in the nebulous area". But as Justice Cardozo said, "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in spite of it. They have the power - though not the right to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law". A Supreme Court which chafes at "the

walls of the interstices" erected by the Constitution is usurper of power None other than the great and 'activist' judge, Lord Denning posed the question: "May not the judges themselves sometimes abuse or misuse their power? It is their duty to administer and apply the law of the land. If they should divert it or depart from it and do so knowingly - they themselves would be guilty of a misuse of power." Belatedly, the Court's order in the Jharkhand case on March 9, 2005, set the alarm bells ringing. The Court had openly violated the Constitutional bar to interfere with legislative proceedings . A former CJI, Justice J.S. Verma, cited similar instances in a lecture: "The judiciary has intervened to question a mysterious car racing down the Tughlag Road in Delhi, allotment of a particular bungalow to a judge, specific bungalows for the judges, monkeys capering in colonies, stray cattle on the streets, clearing public conveniences, levying congestion charges at peak hours at airports with heavy traffic, etc. under the threat of use of contempt power to enforce compliance of its orders."

One might mention his own attempt to curb free speech. On August 8, 1995, while hearing a contempt of court case, Justice Verma noted that Article 19(1) (a) guarantees freedom of speech and expression while clause (2) specified the grounds on which "reasonable restrictions" can be imposed on its exercise. He made this shocking observation: "But the time has come for this Court to lay down some inherent (sic) limitation in clause (1) itself so that something obnoxious which is not contemplated under the guaranteed freedom and content of clause (1) itself excludes such situation." The Constitution need not be amended. The Court will expand its power by its own rulings. Consider other instances. The Supreme Court admitted a PIL alleging that the Chief Minister of Nagaland, S.C. Jamir, had a nexus with armed rebels and issued notices to him, the CBI and the Centre. It issued notices on a PIL on the Indo-US nuclear accord, "until the same is thoroughly examined by a committee appointed by this Hon'ble Court...and until the matter is thoroughly discussed and passed by Parliament". A petition seeking judicial intervention in diplomatic process merits summary dismissal. Why complain of arrears if such PILs meriting instant dismissal are entertained at all? It took suo moto notice of the violence in the Gujjar agitation and asked the DGPs of Rajasthan, Uttar Pradesh and Haryana and the Delhi Police Commissioner to report on the action taken. The Court has ruled repeatedly that "no court can direct a legislature to enact a particular law". Repeatedly has it violated this ruling. On September 6, 2005, it asked the Union to report on the Lok Pal BM's status. On April 13, 2004, it went so far as to assert "we may clarify (sic) that the provisions of Section 126 of the Representation of the People Act, 1951 shall apply to the advertisement covered by this order". This was no clarification. It was naked legislation, applying a penal provision to political ads on the TV; cases not covered by Section 126. The PILs have gone berserk. But new 'guidelines' are not required. Justice EN. Bhagwati's judgment in the First Judges' Case (1981) is a classic on PILs. Two fundamentals are relevant. One, for the public, was said by Lord Bingham. "The courts tend to be more assertive, active and creative when political organs of the State are least effective. The other for the courts was said by Robert Stevens: "History is littered with examples of judicial hubris ending in judicial tears."

HAS THE PHILOSOPHY OF THE SUPREME COURT ON PUBLIC INTEREST LITIGATION CHANGED IN THE ERA OF LIBERALISATION?

Prashant Bhushan

The foundations of public interest litigation were laid in the late 70s with cases like the Ratlam Municipalities case. The scope and breadth of public interest litigation were expanded in the Eighties from the initial environmental concerns, to concerns like bonded labour, child labour, the rights of detainees, inmates of various asylums, the rights of the poor to education, to shelter and other essential amenities which would enable them to lead a life of dignity. Article 21 was expansively interpreted to include all these rights and the rule of Locus Standi was relaxed to enable any public spirited citizen to move the courts on behalf of a person or persons who may not have the social or financial capacity to move the courts themselves. Subsequently, in the early Nineties the courts also took up as public interest litigation, cases involving corruption in high places and the accountability of public servants.

This new activism on the part of the courts naturally created serious rumblings of discontent in the political and bureaucratic establishments, which charged that the courts were going beyond their normal role and were assuming extra constitutional powers. The political establishment also threatened from time to time to curb the powers of the courts with regard to public interest litigation by legislation. However, since this activist role of the courts gained increasing public support, the political establishment desisted from such legislative misadventures. However, the charges of usurpation of extra constitutional powers by the activist courts, continued to be made by all sections of the ruling establishment.

Unfortunately however, these charges appear to have struck a sympathetic chord among a significant section of the court, as appears from some of their pronouncements recently.

There is now a large body of cases decided in the last decade where the court has not only betrayed a lack of sensitivity towards the rights of the poor and disadvantaged sections of society, but has also made gratuitous and unmerited remarks regarding abuse of public interest litigation. This decade has also been the decade of “economic reforms” as they are called. Several public interest cases were filed during this period challenging alleged perversions, corruption and other illegalities involved in the implementation of the new economic policies. Almost all these cases were dismissed. In several of them, the court hinted at and made remarks suggesting an abuse of public interest litigation. Since I had myself been involved in many of these cases as a lawyer, I thought that it would be interesting to investigate whether one could see a change in the philosophy of the Supreme

Court with regard to public interest litigation during the era of economic reforms. This is what I have set out to do briefly, in this presentation. The results are quite illuminating and indeed, distressing.

In *BALCO Employees Union Vs Union of India* (2002 Vol 2 SCC 343), where the employees union of the government company had challenged its disinvestment on various grounds including the arbitrary and non transparent fixation of its reserve price, the Supreme Court while dismissing the petition went on to make the following observations:

“There is, in recent years, a feeling which is not without any foundation that public interest litigation is now tending to become publicity interest litigation or private interest

litigation and has a tendency to be counter-productive." "PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure, which was evolved where a public spirited person filed a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the court for relief. There have been, in recent times increasing instances of abuse of PIL. Therefore there is a need to re-emphasise the parameters within which PIL can be resorted to by a petitioner and entertained by the court."

The court in this case refused to consider the petition of Mr B. L. Wadhwa, a lawyer known for having taken up many serious public interest cases, on the ground that he was not directly affected by the disinvestment of BALCO. It went on to observe:

"It will be seen that whenever the court has interfered and given directions while entertaining PIL, it has mainly been where there has been an element of violation of article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights, which were secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions, which had been taken by the government in exercise of their administrative power. No doubt a person personally aggrieved by such decisions which he regards as illegal, can impugn the same in the court of law, but, a public interest litigation at the behest of a stranger could not be entertained.

Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the court is satisfied that there has been violation of article 21 and the persons adversely affected are unable to approach the court. The decision to disinvest and the implementation thereof is purely an administrative decision relating to the economic policy of the State and challenge to the same at the instance of a busybody cannot fall within the parameters of public interest litigation. On this ground alone, we decline to entertain the writ petition filed by Shri B. L. Wadhwa".

This effectively meant that a citizen could not challenge by way of PIL, the loot of the public exchequer, unless he was personally affected. It is significant that these observations were made in a case involving a challenge to an element of the so-called "economic reforms" of the government. It will be seen that the Supreme Court has almost without exception negated all challenges to any element of the economic reforms package of the government, even when such challenges were based on specific violation of law or evidence of corruption.

In BALCO itself, the challenge to the sell off of the PSU, was based *inter alia* on a completely non transparent and arbitrary valuation of the company conducted in less than a week by a valuer of immovable property having no experience in the valuation of companies. It had been pointed out that the valuation of the captive power plants of the company alone were worth more than the price at which it was being sold. The court however refused to examine this challenge by saying that the valuation was done by one of the known methods of valuation.

In CITU Vs. State of Maharashtra, where the validity of the Enron power project had been challenged on the ground that it was being set up in violation of section 29 of the Electricity Supply Act, that the project would be ruinous to the finances of the State Electricity Board, and that there was adequate circumstantial evidence of corruption in the sanction of the project, the court restricted the challenge only to examine the accountability of the public servants involved in the sanction of the project. It refused to examine the challenge to the project itself on the ground that they did not think it to be

in public interest to go into the validity of a project, which had been substantially set up and against which several previous challenges had been rejected by the courts. This was said despite the fact that the construction of phase 2 of the project (which was more than twice the size of phase 1) had not even commenced at the time, and that none of the previous challenges to the project were based on the grounds and material on which the CIT U challenge was based. One of the grounds, on which CITU had challenged the project was that under section 29 of the Electricity Supply Act, it was only the Central Electricity Authority which had the power to examine and grant technical and economic approval to the project. In this case, when the CEA was finding the cost of power from this project too high, the Finance Ministry told the CEA not to examine the financial aspects of this project and proceed to grant only technical approval. This is how the project came to be approved which went on to supply power to the State Electricity Board at a cost of upto Rs 27 per unit, as a result of which the supply from the project had to be stopped, leading to claims of thousands of crores by Enron in an arbitral tribunal in London.

In *State of Karnataka Vs. Arun Kumar Agrawal*, (2000 1 SCC 210) the Karnataka High Court had ordered a CBI investigation into the circumstances in which a 1000 MW power project had been approved in Karnataka. The series of highly suspicious circumstances found by the High Court which warranted such investigation were among others:

- A. That the financial capacity of the company, Cogentrix, which had been approved to set up this project was such that no reasonable person could think that it was capable of executing such a project. Its paid-up capital was only 130,000 US\$, as against a project cost of over \$1 billion. Its debt equity ratio was 19.2 is to 1 as against the norm of 2:1.
- B. That Cogentrix had falsely claimed in its techno economic feasibility report that General Electric Co would be its technical partner in order to ride piggyback on the technical experience of GE.
- C. That China Light and Power, which was subsequently brought in as a partner by Cogentrix had shown an amount of 191 million Hong Kong dollars as development costs in India (through its Hong Kong subsidiary, CLP international) though they did not have any ongoing project in India and had not shown how and on what these costs had been incurred. This Hong Kong subsidiary was subsequently shut down and another subsidiary by the same name was opened in the British Virgin Islands, a known tax haven for money-laundering.
- D. That though the requirement for power in Karnataka would mainly be in the Bangalore area, and that is why originally the application of Cogentrix was for setting up a 500 MW plant in Bangalore and another 500 MW plant in Mangalore. Later however, they were allowed to set up the entire 41 1000 MW plant in Mangalore, necessitating expensive transmission of power by the State authorities from Mangalore to Bangalore.
- E. That though the original permission for setting up the plant was given on the basis that Cogentrix would sell this power privately to whoever was willing to purchase it from them at mutually negotiated rates, thereafter the State Electricity Board entered into the power purchase agreement with Cogentrix to purchase the entire power at very high rates.

The Supreme Court however made short shrift of the elaborate High Court judgment, holding that, "Thus none of the 13 circumstances noticed by the High Court can be characterised as giving rise to any suspicion, much less the basis for investigation by a criminal investigating agency."

In Centre for Public Interest Litigation versus Union of India (2000 8 SCC 606), the Supreme Court dismissed the plea for an independent investigation into the government's decision to sell off developed offshore gas and oilfields from ONGC to a private joint venture. The challenge was based on a large number of facts and circumstances suggesting corruption in the deal such as:

- A. The government's own estimates of the oil and gas deposits kept arbitrarily varying at different points of time and the deal was evaluated at the lowest of such estimates.
- B. An SP of the anticorruption unit of the CBI had filed a source information report to the effect that the deal involved a loss of thousands of crores to the public exchequer and recommending that an FIR be registered so that a regular investigation could be commenced and searches and seizures made. However, instead of registering an FIR, the SP was transferred out of the CBI soon after he made this report, and the file on which he made the report was made to disappear. The CBI went on to file a false affidavit in the High Court, denying the existence of the file on which the SP's note had been made.
- C. The CBI had in another case being investigated by it recorded the statement of the private secretary of the Minister of petroleum who had signed the deal, that the Minister had received Rs. Four crores from Reliance Industries, one of the joint venture partners to whom the oilfields had been sold.
- D. Various high officials of the Ministry of petroleum and ONGC who were involved in the evaluation of this deal left their jobs and joined Reliance immediately thereafter.
- E. The CAG had submitted a report on this deal pointing out that:
 - i) The government had not studied the comparative economics of running the gas fields and oilfields through the ONGC versus giving them to a private joint venture.
 - ii) The estimates of gas and oil deposits kept arbitrarily varying at different points of time.
 - iii) Though the deal was evaluated on certain claimed levels of operating expenses by the joint venture, the operating expenses were not capped in the contract, leading to a situation whereby the operating expenses actually claimed by the joint venture in the first few years of operation were higher than those of the ONGC.
 - iv) The royalties and cess payable to the government of India by the joint venture on the extraction of oil and gas were frozen for the duration of the contract, though the JV was allowed to sell the oil and gas at the international market prices prevailing at any point of time.

However, despite the above host of highly suspicious circumstances surrounding the deal, the report of the CAG, and the report of the SP of the CBI, the Court did not think it fit to even order an investigation in the matter, though it castigated and passed strictures against the CBI for the loss of the file containing the SP's report and their false affidavits filed in the High Court.

In Delhi Science Forum versus Union of India (AIR 1996 SC 1356), the petitioners had challenged the award of telecom licences to private companies on various grounds, including that one of the companies HFCL which had made by far the highest bids in nine circles had a very small net worth which made it ineligible. It however sought to make up its net worth by entering into a joint venture with a foreign company, which had a minor equity in the joint-venture, but 90% of its net worth. The petitioners also challenged the decision of the government to place a cap of three circles for any single company, which effectively allowed HFCL to vacate its other six circles, where it was by far the highest bidder, without the penalty of 50 Crores per circle which it would have otherwise had to pay since it could not have possibly paid the licence fees of all 9 circles. Again the court dismissed the challenge by saying that the matter had been cleared by

the tender Evaluation committee and there were no allegations of malafides against it. All other challenges were repelled on the ground that they amounted to challenges to the economic policies of the government.

In *Union of India Vs. Azaadi Bachao Andolan*, (2003 8 SCALE 287) the High Court had struck down a government circular which compelled the IT authorities to exempt post box companies registered in Mauritius as “offshore companies”, from taxation in India on the ground that such a direction violated the IT Act and prevented the IT authorities from lifting the corporate veil of these post box companies in order to examine their real place of residence. The Supreme Court however reversed the High Court decision, holding that the government could in terms of its economic policies grant a tax holiday to foreign companies in order to attract foreign investment. It gave short shrift to the argument that this would violate the Income Tax Act under which non resident companies are taxable on their domestic income and that any change in the tax regime would have to be done by means of a Finance Act passed by Parliament and could not be made by the executive alone.

The Oil companies case (CPIL Vs. UOI 2003 Supp 1 JT 515) is the only case to my knowledge in which the Supreme Court has allowed a challenge to any purported implementation of the new economic policy. It held here that the government oil companies nationalized by Acts of Parliament which specifically mandated the companies to remain government companies could not be privatized without amending the Acts and thus taking the approval of Parliament.

So we see that barring the exception of the oil companies case, the court dismissed all other petitions challenging any executive act taken under the cover of economic reforms. While it may be possible to take the view that all these decisions are technically correct, it is difficult not to get the feeling that the Courts decisions were influenced by its own approval of the new policies of liberalisation, privatisation and globalisation. Indeed, the court in *Balco* went on to say that, “lastly, no ex parte relief by way of injunction especially with respect to public projects and schemes or economic policies or schemes should be granted. It is only when the court is satisfied for good and valid reasons, that there will be irreplaceable and irretrievable damage that an injunction be issued after hearing all the parties. Even then the petitioner should be put on appropriate terms such as providing an indemnity or an adequate undertaking to make good the loss or damage in the event the PIL filed is dismissed.” A similar proposition, virtually restraining the court from granting any interim orders in PILs challenging any “development projects”, was also laid down by the court in *Raunaq International* (1999 1 SCC 492). Obviously, if a public interest petitioner is asked to give a bank guarantee or even an undertaking that he will make good the loss that may occur to the government or any other person because of an interim order obtained in his petition, in the event of his petition eventually being dismissed, no interim order can never be granted in a PIL. No petitioner, especially one who moves the court in public interest, can be held responsible for the vagaries of the court. Different judges have completely different views on even matters of law. The *Narmada* matter for example came to be heard and decided by a different bench from that which had originally stayed the construction of the Dam. Even the bench which eventually dismissed the petition and allowed the construction to proceed had continued the stay order in various hearings. Could or should the NBA have been saddled with any loss occasioned to the government or the project authorities or the contractors on account of the stay order which stopped the construction for four years? It would completely stultify PILs, if such a pernicious view is allowed to prevail.

The activism of the Supreme Court in the last decade is most evident in environmental cases, particularly cases involving the urban environment or deforestation. Thus, the court has taken sweeping and bold steps to move polluting industries out of Delhi, to improve the air quality of Delhi by forcing commercial vehicles to convert to CNG, and to stop deforestation across the country. But it must be noted that in a number of cases where the cause of the environment was pitted against “development projects”, such as

large dams, or even hotels and housing colonies, the cause of the environment gave way to the interest of such development. It is important to note that in many of these cases, the legal soundness of the case was also evident from the fact that some of the judges gave dissenting judgements or that the court went against the advice of its own expert committees.

In *Narmada Bachao Andolan versus union of India* (2000 10 SCC 664), despite the strong dissenting judgement of Justice Bharucha, pointing out that the Sardar Sarovar project was proceeding without a comprehensive environmental appraisal and without even the necessary environmental impact studies having been done, as was evident from the documents of the government itself, the majority judges still went on to approve the project and allowed it to go on without any comprehensive environmental impact assessment which was necessary even according to the governments own rules and notifications. The underlying reasons and ideology behind the subordination of the cause of the environment to the cause of "development", is also evident from the majority judgement. There are several passages in the majority judgement, extolling the virtues of the kind of development brought in by large dams. The judgement even goes on to gratuitously emphasise the myth that the Bhakra dam was responsible for the green revolution in the country. This, despite the fact that the court had specifically restrained the Narmada Bachao Andolan from making any submissions on the pros and cons of large dams. The court also goes on to make disparaging remarks against the NBA as being an anti development organisation.

The same subordination of environmental interests to the cause of "development" is evident in the Supreme Court's judgement in the Tehri Dam case (*N.D. Jayal Vs. UOI*, 2003 7 SCALE 54), where the governments own expert committee known as the Hanumantha Rao committee had given an elaborate report pointing out a series of violations of the conditions on which environmental clearance to the project had been given by the Ministry of environment. The committee had pointed out that a number of studies which were necessary to evaluate the environmental impact of the project had not been conducted and had recommended these be immediately conducted. However, despite this, though Justice Dharmadhikari held that in order to ensure compliance with the conditions of environmental clearance, it was necessary to constitute an independent expert committee which would monitor the compliance and further construction of the Dam could only proceed on the green signal of this expert committee, the majority judgement did not even bother to ensure compliance with the conditions of environmental clearance of the project. Again, the judgement makes remarks extolling the virtues of development projects like such large dams.

This attitude showing the Court favouring "development" over the rights of oustees or the environment is most clearly evident in the manner in which the court has sought to push the Mega project called "Interlinking of rivers". Consider the circumstances. On Independence Day last year, a paragraph was added in the President's speech to the effect that the problems of floods and drought can perhaps be solved by interlinking the rivers. This paragraph was enough for a lawyer appointed by the Supreme Court as *amicus curiae* (to assist the court) in the Yamuna pollution case to file a short application praying that the court should direct the government to take up this project. As if on cue, the bench headed by the then Chief Justice B.N. Kripal issued notices to all the States and the Centre. On the next day of hearing, which was the day before the retirement of the then Chief Justice, an order was passed which is now effectively being treated by the government as a direction by the court to undertake this project and complete it within the shortest possible time. The order noted that only the Union of India and the State of Tamil Nadu had filed responses to the notice issued by the court. It stated that the Union of India pointed out that the project would cost Rs 5,60,000 crores, would take 43 years, and would need the consent of the States. The State of Tamil Nadu had filed an innocuous affidavit, virtually saying nothing. The court noted that no other State had filed any affidavit and therefore it could be assumed that none had any objection to the implementation of this project! After orally noting, that funds

cannot be any constraint for the government for a project in national interest, the court observed in its order that the project should be completed within 10 years! It also went on to advise the government that in case consent was not forthcoming from the States, the government should consider passing a legislation to obviate consent of the States for this project.

All this for a project which would require funds equal to the total irrigation budget of the country for the next 44 years, if the Ninth Plan expenditure is any guide. And all this without hearing any interested party, not even the States, without any discussion or debate whatsoever, without completing even feasibility studies, leave aside the question of social, environmental, economic or optimality assessments! Such is the casual nonchalance with which this country is being pushed to a course which would have unparalleled and unprecedented, financial, social and environmental consequences.

In *TATA Housing Development Company Vs. Goa Foundation* (2003 7 SCALE 589), the court went against the report of its own expert committee in allowing the construction of a housing colony on land which had been held by the committee to be forest land. The court held that the committee had wrongly classified this land as forestland, by holding that the committee had deviated from its own norms. The court also relied on the reports of some other private experts filed by the Tata Housing development Company. Without entering into an elaborate discussion of the merits of this judgement, it may only be noted, that such microscopic examination of a report of the courts own expert committee has never been done at the instance of a poor or weak petitioner. For example, the court did not critically examine or interfere with the report and recommendations of the Centrally empowered committee appointed by the court, regarding fishing by poor local fishermen in the Jambudvip islands. The courts orders based on the committee's report had effectively deprived hundreds of poor fishermen of their livelihood who were using the Jambudvip islands.

The period of economic reforms also appears to have coincided with an apparently decreased sensitivity of the courts to the rights of the poor. This is evident from the attitude that the court has displayed towards slum dwellers, oustees and workmen. In *Almitra Patel Vs. Union of India*, (2000 3 SCC 575) the court while adversely commenting upon the governments policy to rehabilitate slum dwellers, remarked that, "the promise of free land, at the taxpayers cost, in place of a jhuggi, is a proposal which attracts more land grabbers.

Rewarding an encroacher on public land with the free alternative sites is like giving a reward to a pickpocket." This, despite that the court was aware of the fact that most of the dwellers live in sub human conditions and do not have access to other houses, and the court had earlier repeatedly pronounced that the right to shelter and housing is a fundamental right of every citizen of the country.

In *Ekta Vs. Union of India*, the Supreme Court refused to stop the eviction of slum dwellers in Calcutta who had been living in those slums for the last more than 30 years, despite the fact that they had no other access to housing nor were they being offered any alternative place to go by the government. This was a case where the High Court had ordered the eviction on the ground that the slums were a public nuisance. In *Azaadi Bachao Andolan versus union of India*, (2003) the Supreme Court even refused to examine the question whether the Land Acquisition Act in so far as it allowed compulsory acquisition of land from persons who are dependent upon that land for their livelihood is violative of their fundamental rights, since the Act does not obligate the government to provide them with alternative land or an alternative means of livelihood. The challenge to the validity of the Act was made in the circumstances that the monetary compensation given under the Act does not enable the oustees to recover what they lose by their displacement as a result of compulsory acquisition of the land, and that they are in effect deprived of their livelihood by such compulsory acquisition.

The recent decision of the Supreme Court (*T.N. Rangarajan Vs. State of Tamil Nadu*),

holding that there is neither any fundamental nor legal nor any moral right to strike on the part of workmen, (which not only goes against the Statute where this right has been recognized, but also against several earlier judgements) has further strengthened the perception among a significant class of poor and disadvantaged sections of society, that despite its expansive pronouncements on the ambit of fundamental rights under Article 21 of the Constitution, the ideology of the Supreme Court has during this phase of “reforms”, shifted decisively in favour of the rich and powerful sections of society.

The above cases provide more than anecdotal evidence for the propositions that, a) The Supreme Court as an institution has frowned upon challenges to any action of the executive taken in the purported furtherance of “economic reforms”, even when such challenges were based on violations of Statute and evidence of corruption, and b) The court appears to have diluted its interpretation of Article 21, in the recent past. At the very least, it has often not acted to enforce the rights that it had declared earlier in favour of the poor and the weak.

In these circumstances, it is indeed tempting to argue that the recent drawing back of the court in PIL, and the fears expressed by it of the possible abuse of PIL is because the court has in fact bought the ideology underlying the economic reforms- an ideology which venerates the virtues of the free market and undermines the role of the State in providing education, jobs, and the basic amenities of life to its citizens. Such an ideology runs counter to the Court’s earlier expansive interpretation of Article 21. This hypothesis does seem to offer the simplest explanation for the above decisions of the Court.

MOTION FOR THE REMOVAL OF JUSTICE JAGDISH BHALLA

Press Release: *New Delhi 16th November 2007*

On 28/3/05, the then additional S.P. of Noida wrote to the District Magistrate of Noida that during his investigation into the criminal activities of Moti Goel, a leader of a land Mafia of U.P., it had come to his knowledge that Mr. Goel had sold land in Noida, through power of attorney, to some people including one Renu Bhalla. He recommended a proper investigation into the land transactions by a revenue official. The then Dist. Magistrate marked the matter for inquiry to the SDM, Noida.

On 21/6/05 and 30/9/05, the SDM of Noida wrote letters to the DM that a land Mafia led by a notorious criminal, Moti Goel, was operating in Noida, which was grabbing public land in connivance with public officials and then selling parts of it to influential persons at very low prices to buy their influence. He cited the example of Renu Bhalla who happens to be the wife of Justice Jagdish Bhalla, then a senior judge of the Lucknow Bench of the Allahabad High Court, who had purchased 7,200 sq Meters of land from this Mafia at a price of Rs. 5 lacs, when the market price of the land was supposed to have been over Rs. 7 crores, and even the circle rate was well over the purchase price.

When these facts came to the notice of the Committee on Judicial Accountability, its members wrote to the then Chief Justice on 12/7/06 bringing these facts to his knowledge. Copies of the letters of the Addl S.P., the A.D.M. and the sale deeds were also sent to the Chief Justice. The COJA pointed out that these facts, *prima facie*, indicated serious misconduct on the part of the Judge since the said sale at this unconscionably low price could only have been made by the sellers in order to purchase the influence of the judge. This was particularly significant because they had several civil and criminal cases pending against them in various courts of U.P. which Justice Bhalla may have been in a position to influence. COJA therefore requested the Chief Justice to have a thorough investigation made into the matter by an investigating agency under their control.

On 7th July, 2006, Justice Bhalla ordered the constitution of a special bench, well after court hours, to hear a case of Reliance Energy in which his own son, Aarohi Bhalla was the counsel. This was despite the fact that the Lucknow Bench did not have territorial jurisdiction to hear this case, since it concerned Noida, which was within the territorial jurisdiction of the Allahabad bench. Nevertheless, this bench proceeded to hear and dispose off, the yet to be numbered, petition at a midnight hearing by issuing an order in favour of Justice Bhalla's son's clients.

On learning these facts, COJA sent another communication to the then Chief Justice dated 28/7/06, bringing these facts to his notice, and seeking an investigation and action into this as well, including immediate transfer of the Judge.

However no action was taken by the then Chief Justice on either of these complaints. On 1/11/06, COJA therefore wrote to the Chief Justice seeking his consent for registering an FIR on the matter of purchase of land in Noida in the name of Justice Bhalla's wife, so that at least a police investigation could be made in this matter which *prima facie* appeared to constitute an offence under the Prevention of Corruption Act. This was required since the Supreme Court had decreed in the Veeraswami case in 1991 that no FIR can be registered against any sitting judge without the consent of the Chief Justice of India.

However, not only was no action taken on this complaint, but the Supreme Court collegium (with some dissensions) on 14/12/06, recommended his promotion as the

Chief Justice of Kerala. On coming to know of this, Mr. Shanti Bhushan immediately wrote to the President, the Prime Minister etc. calling upon them to initiate impeachment proceedings against Justice Bhalla.

That thereafter, on coming to know that two judges of the Supreme Court who were from Allahabad, who needed to be consulted in the matter of appointment of Justice Bhalla as Chief Justice, were not consulted, COJA again wrote to the President vide letter dated 3/2/07 informing him of this and asking him to send the matter back to the collegium for completing the process of consultation.

Meanwhile Justice Balakrishnan became the Chief Justice of India. Vide letter dated 20/3/07, Mr. Shanti Bhushan wrote to him as well about the lack of consultation of the judges from Allahabad in the recommendation for appointment of Justice Bhalla as Chief Justice of Kerala. He again requested the Chief Justice to meet senior members of COJA to discuss the matter.

Though no impeachment proceedings were initiated, the then President returned the recommendation of Justice Bhalla's appointment, as Chief Justice, to the Government for reconsideration, which was then returned by the PM to the Chief Justice. Since the recommendation of the collegium was not unanimous and therefore not binding on the government, that proposal was dropped.

However, soon thereafter a new proposal was initiated for transferring Justice Bhalla to Chhatisgarh. This proposal was accepted and Justice Bhalla was transferred as puisne judge of Chhatisgarh. However, immediately on his reaching there, he was appointed as acting Chief Justice of Chhatisgarh by a notification issued by the Law Ministry. As soon as this became known, Mr. Shanti Bhushan again wrote to the President on 12/4/07, pointing out that a person who had been found unfit to be appointed a Chief Justice must not be allowed to remain Acting Chief Justice, in which capacity he discharges all the functions of the regular Chief Justice. However, Justice Bhalla has functioned as the acting Chief Justice of Chhatisgarh for the last 7 months.

Recently, it has been learnt that Justice Bhalla has been recommended by the collegium to be promoted and appointed as the regular Chief Justice of the Uttarakhand High Court. It has been learnt that this recommendation has been made by the Chief Justice of India despite the strong dissent of the Senior-most puisne judge of the Supreme Court.

It is in such circumstances that we are constrained to bring these facts to the notice of the people of the country by this press release. The above facts bring to light a distressing state of affairs in the judiciary, wherein, despite the existence of serious charges of Misconduct against a senior judge of the High Court, made by responsible persons on the basis of documentary evidence, not only is no inquiry or investigation made, but he is repeatedly recommended for appointment as the Chief Justice of various High Courts. This is despite the strong dissent by a senior judge of the collegium as well as the refusal of assent by the President to the initial recommendation for appointment as Chief Justice. And this without even consulting some of the judges from Allahabad who needed to be consulted in the matter. This indicates that the Code of Conduct which is said to have been adopted in the Chief Justice's Conference in 1999, and which envisages an in house inquiry by a judges committee into such charges against sitting judges is non functional. It also indicates serious problems in the working of the system of judicial appointments and transfers. Also, no permission is given by the Chief Justice for even registering an FIR in the matter, so that at least a normal criminal investigation could take place on a charge which is *prima facie* an offence under the Prevention of Corruption Act.

In such circumstances, since all other attempts for an independent investigation into the facts have failed, there is no option left except for Members of Parliament to initiate a

motion which may lead to the ultimate removal (impeachment) of the Judge under the Judges Inquiry Act, 1968. Members of Parliament are the only persons qualified to initiate such a motion. The motion will have to be signed by 100 M.P.s of the Lok Sabha, or 50 M.P.s of the Rajya Sabha. On admission of the motion a 3 member Inquiry Committee would then be constituted by the Speaker, Lok Sabha / Chairman, Rajya Sabha, to inquire into the charges. This committee will consist only of Judges / Jurists; they will frame definite charges against the concerned Judge on the basis of which an investigation will be held. The person against whom the charges are made would then get a full opportunity in the investigation proceedings to defend himself before his peers. At the conclusion of the investigation the Committee will submit its report to the Speaker / Chairman stating the findings on each of the charges, after which the report will be laid before the House. If the Report of the Committee contains a finding that the Judge is not guilty of any misbehaviour then the motion shall lapse, otherwise the motion, together with the report of the Committee will be taken up for consideration by the House or Houses of Parliament in which it is pending and then proceeded with under the Constitutional Provisions relating to impeachment.

We therefore urge all Hon'ble Members of Parliament, cutting across party lines to sign the motion for initiation of Proceedings under the Judges Inquiry Act, 1968. By doing so they would initiate (there is now no other way) the necessary statutory Inquiry into the conduct of the Judge in question; by signing the motion the Members of Parliament will not be prejudging anything, much less the Judge's guilt or innocence. They will only be setting in motion (on the basis of existing data set out above) an investigation proceedings which would lead ultimately either to impeachment or exoneration of the Judge of charges on misbehaviour. By signing the motion the Hon'ble members will be affirming their firm commitment to maintaining and upholding the rule of law and the Constitution.

S/d-

RAM JETHMALANI

SHANTI BHUSHAN

FALI S. NARIMAN

MOTION FOR THE REMOVAL OF JUSTICE JAGDISH BHALLA

To,
The Speaker
Lok Sabha

Subject: Notice for presenting a motion for the removal of Justice Jagdish Bhalla as a Judge/Chief Justice of the High Court u/s of the Judges Inquiry Act, 1968

We, the undersigned Members give notice for the presentation of a motion for the removal of Justice Jagdish Bhalla as judge/Chief Justice of the High Court for the following acts of misconduct:

1. That Justice Jagdish Bhalla while being a judge of the Lucknow bench of the Allahabad High Court purchased through his wife a large piece of land measuring 7,200 sq meters or thereabouts around the Noida/Greater Noida expressway in the year 2003 at a price which was far below its market price, from persons against whom several criminal and civil cases were pending in the courts of U.P. where Justice Bhalla was in a position to exercise his influence.
2. That Justice Jagdish Bhalla as the senior judge of the Lucknow Bench of the Allahabad High Court ordered the constitution of a special bench after court hours on 7/7/06 to hear the unregistered case of Reliance Energy pertaining to Noida, when his own son was the counsel for Reliance and the Lucknow Bench did not even have territorial jurisdiction to entertain a case relating to Noida.
3. That Justice Jagdish Bhalla used his position and influence to obtain the allotment of several plots for himself and his close relatives, including his son, brother, sister, brother in law, sister in law etc from the Lucknow Development Authority and the Noida authority. That he thereafter used his influence to get several of these allotments changed from new sectors to developed and highly priced sectors through the discretionary powers of the Vice Chairman, LDA.

EXPLANATORY NOTE ON THE NOTICE OF MOTION FOR THE REMOVAL OF JUSTICE JAGDISH BHALLA

Charge No. 1.

That Justice Jagdish Bhalla while being a judge of the Lucknow bench of the Allahabad High Court purchased through his wife a large piece of land measuring 7,200 sq meters or thereabouts around the Noida/Greater Noida expressway in the year 2003 at a price which was far below its market price, from persons against whom several criminal and civil cases were pending in the courts of U.P. where Justice Bhalla was in a position to exercise his influence.

Explanatory Note:

Renu Bhalla, the wife of Justice Bhalla purchased about 7,200 Sq Metres of land Vide 2 separate sale deeds dated 21/7/03 for sums of Rs 1 lacs and 4 lac respectively, from Veena Goel, wife of Moti Goel, and from Anshu Bhale, son of V.K. Jain, through power of attorney holders. This land is situated in Village Shahpur Goverdhan pur Khader, in Dadri, Noida, near Sector 132, on the Noida-Greater Noida expressway.

On 28/3/05, the DSP Noida wrote to the DM pointing out that in the investigation of various criminal cases of cheating, forgery, and Corruption, against a well known leader of a land Mafia, Moti Goel, he came across evidence that Moti Goel had been involved in acquiring and selling gaon Sabha land, which needed investigation by a revenue official. The DM marked it for investigation to the SDM.

The SDM Noida in his reports to the DM, dated 21/6/06 and 30/9/06, notes that various lands belonging to the gaon sabha and had been illegally acquired by a notorious members of a land mafia operating in Noida, named Moti Goel, Harish Nagar etc. He had thereafter sold parts of this land to various influential persons in U.P. for sums well below the market price. The SDM also mentioned that various disputes about the land and several criminal cases had been going on against Moti Goel in several courts of U.P. By way of example he notes that 7,200 sq metres of land had been sold to Renu Bhalla at a price of Rs. 5 lacs when the market price of this land was Rs. 7.2 Crores. Even the circle rate according to him was Rs. 72 lacs for the land purchased by Renu Bhalla for Rs. 5 lacs only. Even the sale deeds mention a circle rate of Rs. 20 lacs/Ha for this land, on the basis of which the stamp duty was paid.

It is inconceivable that this purchase of land could have been done by Renu Bhalla who is a housewife without the active involvement of Justice Bhalla. The purchase of this land at a price which is less than 1% of its market price from members of a land Mafia against whom various civil and criminal cases were going on in courts of U.P. over which Justice Bhalla as the senior judge of the Lucknow Bench could have exercised influence in various ways, amounts to gross misconduct on this part and potentially involves offences under the Prevention of Corruption Act.

Charge No 2.

That Justice Jagdish Bhalla as the senior judge of the Lucknow Bench of the Allahabad High Court ordered the constitution of a special bench after court hours on 7/7/06 to hear the unregistered case of Reliance Energy pertaining to Noida, when his own son was the counsel for Reliance and the Lucknow Bench did not even have territorial jurisdiction to entertain a case relating to Noida.

On 7/7/06 Justice Bhalla as the senior judge of the Lucknow bench of the Allahabad High Court ordered the constitution of a special bench of Justices Bhanwar Singh and Justice S.N. Shukla after court hours to hear the unregistered case of Reliance Energy which pertained to Noida. This is especially significant because Justice Bhalla's son Aarohi Bhalla was the counsel for Reliance Energy. Moreover, the Lucknow Bench did not have territorial jurisdiction over Noida, which was clearly with the Allahabad bench. Therefore this petition which was not even registered or numbered could not have been heard by judges of the Lucknow Bench at all. The special bench however, not only heard the matter just before midnight, but proceeded to pass final orders in favour of Reliance by dispensing with notice. The above act was Justice Bhalla in ordering the constitution of a special bench after office hours to hear an unregistered case which could not have even otherwise been heard by the Lucknow bench due to lack of territorial jurisdiction is itself improper. However doing so when his own son was the counsel for the petitioner, amounts to serious misconduct.

Charge No. 3.

That Justice Jagdish Bhalla used his position and influence to obtain the allotment of several plots for himself and his close relatives, including his son, brother, sister, brother in law, sister in law etc from the Lucknow Development Authority and the Noida authority. That he thereafter used his influence to get several of these allotments changed from new sectors to developed and highly priced sectors through the discretionary powers of the Vice Chairman, LDA.

Explanatory Note:

On 2nd July 2005, the Noida Authority in an purported and infamous draw of lots allotted plot No. F52 in Sector 44, Noida to Aarohi Bhalla, son of Justice Jagdish Bhalla. The market price of this plot was several crores and it was being allotted at a fraction of its market value. The Times of India published a cover story on this scandalous allotment on 6/7/05, which showed that a disproportionate number of allottees were VIPs and their relatives. This draw of lots which was obviously fixed, was cancelled by the Noida authorities on 4/7/05. Thereafter on 4/10/05, the Allahabad High Court ordered a CBI investigation to "find out the officials/employees of Noida, UPDESCO and the State Government responsible for manipulation in the draw of lots held by Noida on 2/7/05 for its residential plot scheme 2004(1), and the names of such persons/beneficiaries at whose behest and direction, the manipulation was done."

On 23/9/03, Justice Bhalla was allotted plot No. A-5/410 in Viraj Khand, Gomti Nagar by the Lucknow Development Authority (LDA). This was despite the fact that he already owned a plot allotted to him earlier by the LDA (plot 5/74 B, Vishal Khand), and that no person is entitled for a second allotment in the same city. Within 3 months thereafter, he used his influence with the LDA Vice Chairman to get the allotment changed to far more developed and expensive sector (A 5/25 Vineet Khand), purportedly on the ground that the Viraj Khand where he was allotted a plot was not developed.

Another plot No. 3/241 in Viraj Khand was allotted to Justice Bhalla's son, Aarohi Bhalla. This was also got changed soon after allotment to a much more developed and expensive sector Vinay khand (first to plot 5/20 and then to 3/242) on 22/11/01. Obviously this change to a much more expensive sector could not have been made in this manner for the asking, utilizing the discretionary powers of the LDA Vice Chairman, without the influence of Justice Bhalla. It is significant that Aarohi Bhalla sold this plot within 4 months of allotment on 26/3/02 for a large profit.

Another plot was allotted to Jaideep Bhalla, brother of Justice Bhalla on 19/7/97 (1/55, Viraj Khand). On 15/10/03 (around the same time that Justice Bhalla got his allotment changed from Viraj Khand to Vineet Khand), Jaideep Bhalla's allotment was also changed to B-2/151 Vishesh Khand at his asking, by the Vice Chairman, LDA using his discretionary powers.

Another plot (3/19 Viraj Khand) was allotted to Pratibha Bhalla, wife of Jaideep Bhalla on 7/4/98. On 29/6/02, this was also transferred to the far more developed and expensive Vishesh Khand (plot No. 4/133), using the discretionary powers of the Vice Chairman LDA.

Another plot No 3/235 in Viraj Khand was allotted to Ashok Bhanot, (Justice Bhalla's sister's husband) on 17/4/98. On 19/10/00, this was got changed to a more expensive and lucrative sector (1/42 Vineet Khand). Subsequently, on 28/6/01, it was changed to an even more expensive and developed sector, Vishal Khand, (plot no. 4/78).

Another plot No 5/20 B Type, Vinay Khand was allotted on 2/6/01 to Justice Bhalla's cousin, Mrs. Manorama Sharma. This was also subsequently transferred at her request to a more developed and expensive sector Vishal Khand (No. 4/82).

All these allotments of so many plots to Justice Bhalla and his close relatives, and their subsequent transfers to more expensive and developed sectors, using the discretionary powers of the Vice Chairman LDA, could not have taken place without the influence of Justice Bhalla who was occupying a very powerful office of a High Court judge in Lucknow. The use of his influence and his office in this manner amounts to serious misconduct.

List of endorsing Organisations

Aawaz
Abhyudaya
Academy for Socio Legal Studies
Action Aid International - India
Action India
Anhad
Asha Ashram
Bal Vikas Dhara
Bandhar Mazdoor Sangharsh Samiti
CACIM
Campaign against Child Labour
Campaign for Survival and Dignity
Centre for Civil Society
Centre for Media Studies
CHETNA
CHINTAN
Combat Law
Committee for Judicial Accountability
Commonwealth Human Rights Initiative
DAMU
Delhi Forum
Delhi Shramik Sangathan
Ekta Parishad
Forum of Voters
Hammal Panchayat, Pune
Harit Recyclers Association
Hazards Centre
Hotline Asia-Delhi
Housing and Land Rights Network
Human Rights Law Defenders
IAMR
CSDS
India Social Institute
IIPM
Insaf
Intercultural Resources
ITDP
Jagori
Jan Sangharsh Vahini
Janhit Manch
Jhuggi Basti Sangharsh Morch, Indore
Kashtakari Sangathan
Labour Education and Development Society
Sneh Bandhan Society
Lok Raj Sangathan
Lok Shasan Andolan
Mahila Chetna Kendra
Mahila Kalpna Shakti
MANUSHI
MKSS - Mazdoor Kisan Shakti
Sangathan
Mumbai Mahanagar Vyapari Seva
Parishad
NASVI
National Alliance for Peoples
Movement
Natural Heritage First
Navdanya
NCPRI
NCWR
NFIW
Nidan, Patna
Nirmana
Nishan
NISHAN-Upholding Rights and
Justice
Parivartan
Patri Dukandar Sangathan,
Lucknow
People's Cultural Centre
Peoples News Network
Human Rights Law Network
Plachimada Solidarity Committee
PUCL
PUDR
Ridge Bachao Andolan
Sahvog Trust
Save The Children-UK
Socio Eco Reforms and Research Centre
Transparency International India
Unorganized Labour
Vigyan Foundation, Lucknow
Vision Foundation